S. HRG. 100-611

FEDERAL LAND EXCHANGE FACILITATION ACT OF 1987

HEARING

BEFORE THE

SUBCOMMITTEE ON
PUBLIC LANDS, NATIONAL PARKS AND FORESTS

OF THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

H.R. 1860

ENTITLED THE "FEDERAL LAND EXCHANGE FACILITATION ACT OF 1987"

MARCH 14, 1988

Printed for the use of the
Committee on Energy and Natural Resources

U.S. GOVERNMENT PRINTING OFFICE

85-143 WASHINGTON : 1988

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S311-59

COMMITTEE ON ENERGY AND NATURAL RESOURCES

J. BENNETT JOHNSTON, Louisiana, *Chairman*

DALE BUMPERS, Arkansas	JAMES A. McCLURE, Idaho
WENDELL H. FORD, Kentucky	MARK O. HATFIELD, Oregon
HOWARD M. METZENBAUM, Ohio	LOWELL P. WEICKER, JR., Connecticut
JOHN MELCHER, Montana	PETE V. DOMENICI, New Mexico
BILL BRADLEY, New Jersey	MALCOLM WALLOP, Wyoming
JEFF BINGAMAN, New Mexico	FRANK H. MURKOWSKI, Alaska
TIMOTHY E. WIRTH, Colorado	DON NICKLES, Oklahoma
WYCHE FOWLER, JR., Georgia	CHIC HECHT, Nevada
KENT CONRAD, North Dakota	DANIEL J. EVANS, Washington

DARYL H. OWEN, *Staff Director*
D. MICHAEL HARVEY, *Chief Counsel*
FRANK M. CUSHING, *Staff Director for the Minority*
GARY G. ELLSWORTH, *Chief Counsel for the Minority*

SUBCOMMITTEE ON PUBLIC LANDS, NATIONAL PARKS AND FORESTS

DALE BUMPERS, Arkansas, *Chairman*
JEFF BINGAMAN, New Mexico, *Vice Chairman*

JOHN MELCHER, Montana	MALCOLM WALLOP, Wyoming
BILL BRADLEY, New Jersey	LOWELL P. WEICKER, JR., Connecticut
TIMOTHY E. WIRTH, Colorado	MARK O. HATFIELD, Oregon
WYCHE FOWLER, JR., Georgia	PETE V. DOMENICI, New Mexico
KENT CONRAD, North Dakota	FRANK H. MURKOWSKI, Alaska
	CHIC HECHT, Nevada

J. BENNETT JOHNSTON and JAMES A. MCCLURE are Ex Officio Members of the Subcommittee

THOMAS B. WILLIAMS, *Senior Professional Staff Member*
ELIZABETH J. NORCROSS, *Professional Staff Member*

CONTENTS

Page

H.R. 1860 3

STATEMENTS

Burford, Robert F., Director, Bureau of Land Management, Department of the Interior 19
Glass, Thomas R.H., chairman, Western Land Exchange Co 48
Jarvis, T. Destry, vice president, Conservation Policy, National Parks and Conservation Association 67
Leonard, George M., Associate Chief, Forest Service, Department of Agriculture 34
Rey, Mark, vice president, Public Timber Council, National Forest Products Association 77
Wirth, Hon. Timothy E., U.S. Senator from Colorado 1

ADDITIONAL MATERIAL

American Congress on Surveying and Mapping and the American Society for Photogrammetry and Remote Sensing, statement 85

FEDERAL LAND EXCHANGE FACILITATION ACT OF 1987

MONDAY, MARCH 14, 1988

U.S. SENATE,
SUBCOMMITTEE ON PUBLIC LANDS,
NATIONAL PARKS AND FORESTS,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:10 p.m., in room SD–366, Dirksen Senate Office Building, Hon. Timothy E. Wirth, presiding.

OPENING STATEMENT OF HON. TIMOTHY E. WIRTH, U.S. SENATOR FROM COLORADO

Senator WIRTH. The subcommittee will come to order. Today's subcommittee hearing focuses on the Federal Land Exchange Facilitation Act, introduced by Chairman Bumpers, myself, and ten other Senators last Spring. Our hearing today will focus on both S. 1260 and the House measure H.R. 1860, which passed the House right before Christmas last fall.

As those familiar with the Federal Land Management and acquisition programs are aware, land exchanges are becoming an increasingly important tool for the Federal Government to acquire key lands for recreation, wildlife habitat protection and commodity production.

For example, in 1986 alone, the Forest Service acquired nearly three times as much land by exchange as it did by purchase. It's likely that land exchanges will play an even more significant role in the years ahead.

The Federal Land Policy and Management Act and the other laws which govern land exchanges are basically sound and the Congress has done an excellent job in conveying basic exchange authority of the agencies, which administer our publicly owned lands.

However, it's also clear that the current land exchange process is often overly cumbersome, fraught with conflicting policies and regulations, and most unfortunate of all, terribly time consuming. Indeed, if there's one complaint that I hear most often about land exchanges, it's that they simply take too much time and in the process many excellent exchange proposals are abandoned, because the non-Federal party loses patience or perhaps interest.

S. 1260 and H.R. 1860 are, in my opinion, modest, but useful measures which tackle the issue of delay head-on by proposing several key reforms.

First, the Bill sets basic timetables to guide, exchange transactions, and to require the timely preparation of land appraisals.

Second, and perhaps most importantly, the Bills mandate the resolution of appraisal disputes through arbitration or other means. This, in my opinion, will do more than anything else to remove the major roadblock to many exchanges by providing for both an impartial review and a timely decision on appraisal decisions.

And third, this bill will give the Government flexibility and discretion to help pay for some of the costly preliminary work such as land surveys that must be done to prepare land for exchange.

This, in my opinion, is a good bill. If the Federal Land Exchange Facilitation Act becomes law, land exchanges will be reviewed and completed more expeditiously and that will benefit both the Federal Government and State Governments and the private parties who participate in these transactions.

[The text of H.R. 1860 follows:]

II

100TH CONGRESS
1ST SESSION

H. R. 1860

IN THE SENATE OF THE UNITED STATES

DECEMBER 15, 1987

Received; read twice and referred to the Committee on Energy and Natural Resources

AN ACT

Entitled the "Federal Land Exchange Facilitation Act of 1987".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Land Exchange Facilitation Act of 1987".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds and declares that—

(1) land exchanges are a very important tool for Federal and State land managers and private landowners to consolidate Federal, State, and private holdings

of land or interests in land for purposes of more efficient management and to secure important objectives including the protection of fish and wildlife habitat and aesthetic values; the enhancement of recreation opportunities; the consolidation of mineral and timber holdings for more logical and efficient development; the expansion of communities; the promotion of multiple-use values; and fulfillment of public needs;

(2) needs for land ownership adjustments and consolidation consistently outpace available funding for land purchases by the Federal Government and thereby make land exchanges an increasingly important method of land acquisition and consolidation for both Federal and State land managers and private landowners;

(3) the Federal Land Policy and Management Act of 1976 and other laws provide a basic framework and authority for land exchanges involving lands under the jurisdiction of the Secretary of the Interior and the Secretary of Agriculture; and

(4) such existing laws are in need of certain revisions to streamline and facilitate land exchange procedures and expedite exchange timetables.

(b) PURPOSES.—The purposes of this Act are:

(1) to facilitate and expedite land exchanges pursuant to the Federal Land Policy and Management Act of 1976 and other laws applicable to exchanges involving lands managed by the Departments of the Interior and Agriculture by—

(A) providing more uniform rules and regulations pertaining to land appraisals which reflect nationally recognized appraisal standards but which also reflect any differences between appraisals of lands and interests being considered for acquisition by the Federal Government and appraisals of lands and interests being considered for transfer out of Federal ownership; and

(B) establishing procedures and timetables for the arbitration of appraisal disputes.

(2) to provide sufficient resources to the Secretaries of the Interior and Agriculture to ensure that land exchange activities can proceed consistent with the public interest.

(3) to require a study and report concerning improvements in the handling of certain information related to Federal and other lands.

SEC. 3. LAND EXCHANGES AND APPRAISALS.

(a) FLPMA AMENDMENTS.—Section 206 of the Federal Land Policy and Management Act of 1976 (43 U.S.C.

1716) is hereby amended by adding the following new subsections:

"(d)(1) The Secretary of the Interior and the Secretary of Agriculture shall promulgate regulations providing that, unless it is mutually agreed otherwise prior to the expiration of ninety days after entering an agreement to initiate an exchange of land or interest therein pursuant to this Act or other applicable law, no later than ninety days after entering into such an agreement the Secretary concerned and other party or parties involved in the exchange shall arrange for appraisal (to be completed within a time frame negotiated by the parties) of the lands or interests therein involved in the exchange in accordance with subsection (f) of this section.

"(2) If within one hundred and eighty days after the submission of an appraisal or appraisals for review and approval by the Secretary concerned, the Secretary concerned and the other party or parties involved cannot agree to accept the findings of an appraisal or appraisals, the appraisal or appraisals shall be submitted to an arbitration to be conducted in accordance with the real estate valuation arbitration rules of the American Arbitration Association. Such arbitration shall be binding on the Secretary concerned and the other party or parties involved in the exchange insofar as concerns the value of the lands which were the subject of the appraisal or appraisals.

"(3) Within thirty days after the completion of the arbitration, the Secretary concerned and the other party or parties involved in the exchange shall determine whether to proceed with the exchange, modify the exchange to reflect the findings of the arbitration or any other factors, or to terminate the exchange. A decision to terminate the exchange may be made by either the Secretary concerned or the other party or parties involved.

"(4) After submission of an appraisal or appraisals for review by the Secretary concerned but prior to submission of an appraisal or appraisals to arbitration pursuant to paragraph (2) of this subsection, if both the Secretary concerned and the other party or parties involved in an exchange determine it is in the best interest of consummating an exchange pursuant to this Act or other applicable law, they may mutually agree to employ a process of bargaining or some other process (instead of arbitration) to determine the values of the properties involved in the exchange, or they may mutually agree to suspend or modify any of the following:

"(A) The arbitration requirements of this subsection.

"(B) The deadlines for submission of an appraisal to arbitration.

"(C) The deadline for determinations subsequent to completion of an arbitration.

"(e) Unless mutually agreed otherwise by the Secretary concerned and the other party or parties involved in an exchange pursuant to this Act or other applicable law, all patents or title to be issued for land or interests therein to be acquired by the Federal Government and lands or interests therein to be transferred out of Federal ownership shall be issued simultaneously after the Secretary concerned has taken any necessary steps to assure that the United States will receive acceptable title.

"(f)(1) Within one year after the enactment of subsections (d) through (i) of this section, the Secretaries of the Interior and Agriculture shall promulgate new and comprehensive rules and regulations governing exchanges of land and interests therein pursuant to this Act and other applicable law. Such rules and regulations shall fully reflect the changes in law made by subsections (d) through (i) of this section and shall include provisions pertaining to appraisals of lands and interests therein involved in such exchanges.

"(2) The provisions of the rules and regulations issued pursuant to paragraph (1) of this subsection governing appraisals shall reflect nationally recognized appraisal standards, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisitions: *Provided, however,* That the provisions of such rules and regulations shall—

"(A) ensure that appraisal standards henceforth cover both the acquisition and disposal of land by the Federal Government and adequately reflect any differences that may exist between appraising lands or interests therein being acquired by the Federal Government and appraising lands or interests therein being transferred out of Federal ownership; and

"(B) with respect to costs or other responsibilities or requirements associated with land exchanges—

"(i) recognize that the parties involved in an exchange may mutually agree that one party (or parties) will assume, without compensation, all or part of certain costs or other responsibilities or requirements ordinarily borne by the other party or parties; and

"(ii) also permit the Secretary concerned, where such Secretary determines it is in the best interest of consummating an exchange pursuant to this Act or other applicable law, and upon mutual agreement of the parties, to make adjustments to the relative values assigned to properties involved in an exchange in order to compensate a party or parties to the exchange for assuming costs or other responsibilities or requirements which would ordinarily be borne by the other party or parties.

"As used in this subparagraph, the term 'costs or other responsibilities or requirements' shall include, but not be limited to, costs or other requirements associated with land surveys and appraisals, mineral examinations, title searches, archeological surveys and salvage, removal of encumbrances, arbitration pursuant to subsection (d) of this section, curing deficiencies preventing highest and best use, and other costs to comply with laws, regulations and policies applicable to exchange transactions, or which are necessary to bring the Federal or non-Federal lands or interests involved in the exchange to their highest and best use for the appraisal and exchange purposes.

"(g) Until such time as new and comprehensive rules and regulations governing exchange of land and interests therein are promulgated pursuant to subsection (f) of this section, land exchanges may proceed in accordance with existing laws and regulations, and nothing in the Act shall be construed to require any delay in, or otherwise hinder, the processing and consummation of land exchanges pending the promulgation of such new and comprehensive rules and regulations. Where the Secretary concerned and the party or parties involved in an exchange have agreed to initiate an exchange of land or interests therein prior to the date of enactment of such subsections, subsections (d) through (i) of this section shall not apply to such exchanges unless the Secre-

tary concerned and the party or parties involved in the exchange mutually agree otherwise.

"(h)(1) Notwithstanding the provisions of this Act and other applicable laws which require that exchanges of land or interests therein be for equal value, where the Secretary concerned determines it is in the public interest and that the consummation of a particular exchange will be expedited thereby, the Secretary concerned may exchange lands or interests therein which are of approximately equal value in cases where—

"(A) the combined value of the lands or interests therein to be transferred from Federal ownership by the Secretary concerned in such exchange is not more than $150,000; and

"(B) the Secretary concerned finds in accordance with the regulations to be promulgated pursuant to subsection (f) of this section that a determination of approximately equal value can be made without formal appraisals, as based on a documented certification made by a qualified appraiser and approved by an authorized officer; and

"(C) the definition of and procedure for determining 'approximately equal value' has been set forth in regulations by the Secretary concerned and the Secre-

tary concerned documents how such determination was made in the case of the particular exchange involved.

"(2) As used in this subsection, the term 'approximately equal value' shall have the same meaning with respect to lands managed by the Secretary of Agriculture as it does in the Act of January 22, 1983 (commonly known as the 'Small Tracts Act').

"(i)(1) Upon receipt of an offer to exchange lands or interests in lands pursuant to this Act or other applicable laws, at the request of the head of the department or agency having jurisdiction over the lands involved, the Secretary of the Interior may temporarily segregate the Federal lands under consideration for exchange from appropriation under the mining laws. Such temporary segregation may only be made for a period of not to exceed five years. Upon a decision not to proceed with the exchange or upon deletion of any particular parcel from the exchange offer, the Federal lands involved or deleted shall be promptly restored to their former status under the mining laws. Any segregation pursuant to this paragraph shall be subject to valid existing rights as of the date of such segregation.

"(2) All non-Federal lands which are acquired by the United States through exchange pursuant to this Act or pursuant to other law applicable to lands managed by the Secretary of Agriculture shall be automatically segregated from

appropriation under the public land law, including the mining laws, for ninety days after acceptance of title by the United States. Such segregation shall be subject to valid existing rights as of the date of such acceptance of title. At the end of such ninety day period, such segregation shall end and such lands shall be open to operation of the public land laws and to entry, location, and patent under the mining laws except to the extent otherwise provided by this Act or other applicable law, or appropriate actions pursuant thereto.".

(b) CONFORMING AMENDMENT.—The first sentence of section 206(b) (43 U.S.C. 1716(b)) of the Federal Land Policy and Management Act of 1976 is hereby amended by inserting the word "concerned" after the words "the Secretary".

(c) ADDITIONAL AMENDMENT.—Section 206(c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716(c)) is hereby amended to read as follows:

"(c) Lands acquired by the Secretary by exchange under this section which are within the boundaries of any unit of the National Forest System, National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, National Wilderness Preservation System, or any other system established by Act of Congress, or the boundaries of the California Desert Conservation Area, or the boundaries of any national conservation

area or national recreation area established by Act of Congress, upon acceptance of title by the United States shall immediately be reserved for and become a part of the unit or area within which they are located, without further action by the Secretary, and shall thereafter be managed in accordance with all laws, rules, and regulations applicable to such unit or area.".

SEC. 4. LAND EXCHANGE FUNDING AUTHORIZATION.

In order to ensure that there are increased funds and personnel available to the Secretaries of the Interior and Agriculture to consider, process, and consummate land exchanges pursuant to the Federal Land Policy and Management Act of 1976 and other applicable law, there are hereby authorized to be appropriated for fiscal years 1989 through 1998 an annual amount not to exceed $4,000,000 which shall be used jointly or divided among the Secretaries as they determine appropriate for the consideration, processing, and consummation of land exchanges pursuant to the Federal Land Policy and Management Act of 1976, as amended, and other applicable law. Such moneys are expressly intended by Congress to be in addition to, and not offset against, moneys otherwise annually requested by the Secretaries, and appropriated by Congress for land exchange purposes.

SEC. 5. SAVING CLAUSE.

Nothing in this Act shall be construed as amending the Alaska Native Claims Settlement Act (Public Law 92–203, as amended) or the Alaska National Interest Lands Conservation Act (Public Law 96–487, as amended) or as enlarging or diminishing the authority with regard to exchanges conferred upon either the Secretary of the Interior or the Secretary of Agriculture by either such Acts. If any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby.

SEC. 6. NFMA AMENDMENTS.

Section 17(b) of the National Forest Management Act of 1976 is hereby amended—

(1) by striking out "$25,000" and inserting in lieu thereof "$150,000";

(2) by striking out "and" at the end of paragraph (3);

(3) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; and "; and

(4) by adding after paragraph (4) the following:

"(5) any adjustment made by the Secretary of relative value pursuant to section 206(f)(2)(B)(ii) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716).".

SEC. 7. ADDITIONAL AMENDMENTS.

The Act of July 26, 1956 (70 Stat. 656, 16 U.S.C. 505a, 505b) is hereby amended as follows:

(a) The words "national forest lands" are hereby deleted wherever they occur, and the words "National Forest System lands" are inserted in lieu thereof.

(b) The words "a national forest" are hereby deleted in the first paragraph, and the words "a unit of the National Forest System" are inserted in lieu thereof.

(c) The following sentence is hereby added at the end of the second paragraph: "Lands interchanged under the authority of this Act shall be deemed to include interests in lands.".

SEC. 8. LAND INFORMATION STUDY.

(a) STUDY.—The Secretary of the Interior shall conduct an assessment of the need for and cost and benefits associated with improvements in the existing methods of land surveying and mapping and of collecting, storing, retrieving, disseminating, and using information about Federal and other lands.

(b) CONSULTATION.—In conducting the assessment required by this section, the Secretary of the Interior shall consult with the following—

(1) the Secretary of Agriculture;

(2) the Secretary of Commerce;

(3) the Director of the National Science Foundation;

(4) representatives of State and local governments;

(5) representatives of private sector surveying and mapping science.

(c) REPORT.—No later than one year after the date of enactment of this Act, the Secretary of the Interior shall report to the Congress concerning the results of the assessment required by this section.

(d) TOPICS.—In the report required by subsection (c), the Secretary of the Interior shall include a discussion and evaluation of the following:

(1) relevant recommendations made by the National Academy of Sciences (National Research Council) on the concept of a multipurpose cadastre from time to time prior to the date of enactment of this Act;

(2) ongoing activities concerning development of an overall reference frame for land and resource information, including but not limited to a geodetic network, a series of current and accurate large-scale maps, cadastral overlay maps, unique identifying numbers linking specific land parcels to a common index of all land records in United States cadastral systems, and a series of land data files;

(3) ways to achieve better definition of the roles of Federal and other governmental agencies and the private sector in dealing with land information systems;

(4) ways to improve the coordination of Federal land information activities; and

(5) model standards developed by the Secretary for compatible multipurpose land information systems for use by Federal, State and local governmental agencies, the public, and the private sector.

(e) RECOMMENDATIONS.—The report required by subsection (c) may also include such recommendations for legislation as the Secretary of the Interior considers necessary or desirable.

Passed the House of Representatives December 14, 1987.

Attest: DONNALD K. ANDERSON,

Clerk.

Senator WIRTH. Our first witness this morning is Mr. Robert Burford, the Director of the Bureau of Land Management and a native of the great state of Colorado, and Mr. George Leonard, the Associate Chief of the Forest Service and the Department of Agriculture.

But, before asking the two of you to provide your testimony to the Committee, let me ask if the distinguished Senator from Wyoming, who has an important and I think very welcome amendment to this legislation has any comments he might like to make?

Senator WALLOP. I have no opening statement. The Administration has some problems with the Amendment. I believe that they can be worked out. I believe they should be worked out and we'll try to do that.

Senator WIRTH. Well, good. We look forward to working with you and I hope that we'll be able to as rapidly as possible, sort out whatever problems remain and I think most of them are gone, and move on expeditiously to passing the legislation in the Senate and coming to agreement with the House and get the Bill through.

Mr. Burford and Mr. Leonard, let me ask you if you would please summarize your testimony in whatever way you think would be most helpful and we will, of course, include your statement in full in the record and why don't you proceed, Mr. Burford.

STATEMENT OF ROBERT F. BURFORD, DIRECTOR, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

Mr. BURFORD. I appreciate the honor and opportunity——

Senator WIRTH. Could you please pull the microphone over?

Mr. BURFORD. I appreciate the opportunity, Senator, to discuss the Administration's views of the Department of the Interior on H.R. 1860. We support the concept of improved procedures for Federal land exchanges. However, we strongly oppose H.R. 1860, as currently drafted, because it falls short of accomplishing this objective and because it contains a provision that the Department of Justice has advised us is unconstitutional.

If this legislation is enacted in its current form, we would recommend that the President veto the bill. However, we submit for your consideration and support, a substitute bill that provides for procedures that will truly expedite the exchange process. H.R. 1860 proposes to improve the efficiency by which the Federal Government accomplishes land exchanges. Specifically, it establishes timetables for steps in the exchange process, requires mandatory arbitration, and modifies the current Federal appraisal process.

We have three major problems with H.R. 1860. First, we believe the mandatory timetables, set in the bill, are unrealistic for some exchanges. A better approach is for the parties to an exchange to agree to a schedule because the time needed for each exchange varies, depending on the complexity of the individual exchange.

Second, we oppose the so-called mandatory arbitration provision in the bill. The Department of Justice has advised that compulsory arbitration by non-Federal officials violates the Appointments Clause of the Constitution. While it may be desirable in some situations to utilize voluntary nonbinding arbitration, we do not believe

it is necessary or should be required in all cases where disagreements exist as to value.

Exchanges of Federally owned lands are required to be made in the public interest. We believe that the determination of the values of the lands or interest to be exchanged must remain with the appropriate Secretary and that outside evaluations should not be imposed on either the Secretary or the other party involved in the exchange. We presently use a variety of conflict-resolution mechanisms to accomplish this same result. These include third party appraisers, blue ribbon panels, and if appropriate, some type of voluntary arbitration.

Arbitration can be costly and time consuming. Moreover, the time and expense of arbitration would be wasted if, after completion of the process, the parties decide not to go forward with the exchange as H.R. 1860 would allow. Finally, we object to the adjustment of relative values and a requirement that the regulations recognize that the parties in an exchange may agree that one party will assume, without compensation, all costs or other responsibilities or requirements ordinarily borne by the other party.

"Costs and other responsibilities or requirements" is defined to include costs of land surveys and appraisals, mineral examinations, archeological surveys and salvage, title searches, removal of encumbrances, arbitration, curing deficiencies preventing highest and best use, compliance with laws, regulations and policies applicable to exchanges and other similar costs. The parties may then agree to make adjustments to the relative values assigned to the properties in the exchange, to compensate a party for assuming costs or responsibilities ordinarily borne by the other party.

We do not believe that the various administrative costs listed in H.R. 1860 should be used to adjust relative values. Agencies are entrusted with responsibility for administering the public lands in accordance with laws passed to protect the public interest. Therefore, there is no justification for discounting the value of the public lands because they are in public ownership. The rights and interests conveyed have a market value which is not diminished by agency administrative costs. In addition, it would be extremely difficult to control administrative costs paid by the non-Federal party should these costs be reimbursable with additional lands. In practice, the proper amount of reimbursement could very well become an issue that would further prolong the land exchange process.

Sections 6 and 7 would amend provisions of laws that apply only to the Forest Service and we support enactment of those provisions. They are also included in our draft bill.

We have no objection to the intent of the study identified in section 8 of the bill. This study would require the Secretary of the Interior to assess the need for improvements in existing methods of land surveying and mapping and of collecting, storing, retrieving, disseminating and using information about Federal and other lands. We agree that there is a need for better coordination of Federal land information activities and are actively working toward this end. We have been working toward this end for the past six years. A properly focused study, looking to the future, could provide a means of enhancing this coordination. Efforts already underway or which could be initiated administratively will accomplish

this same goal. Congressional direction for improved coordination of land information system developments leading to the adoption of national standards for data transfer and exchange might be more effective in actually achieving the desired goal in a timely manner. However, with the great momentum already underway in this area, immediate attention to this issue is critical. For this reason we have not included the study provision in our substitute bill.

Attached to our statement is our proposed bill, which addresses our concerns and provides additional authorities which will truly expedite the exchange process in several ways:

First, the bill would authorize exchanges of Federal lands of not more than $150,000 to be made for approximately equal value without formal appraisals as long as the exchange is based on a statement of value by a qualified appraiser. This is similar to the provision in H.R. 1860. In addition, it would permit exchanges of land of not more than $500,000 in value or 5,000 acres to be made at approximately equal value without any cash equalization. The differential can be no more than 3 percent of the value of the Federal lands. This provision will minimize the conflicts which arise in attempting to establish equal values. It will eliminate the necessity for making significant cash payments to equalize values in smaller exchange situations, while still protecting the public interest.

Second, the bill would authorize the appropriate Secretary to use a variety of voluntary approaches to resolve disputes as to land values including fact-finding non-binding arbitration and mediation. This gives flexibility to negotiate values while not subjecting the parties to unnecessary mandatory requirements which could be unconstitutional.

Finally, our substitute draft bill addresses several matters both included and not included in H.R. 1860, such as a finite time for opening lands to the operation of the mining laws, including the mineral and geothermal leasing laws, a provision allowing for simultaneously executed documents of conveyance to be held in escrow where necessary, and as I said earlier several provisions allowing for expedited exchanges by the Forest Service.

This concludes my prepared statement. I will be pleased to answer any questions.

[The prepared statement of Mr. Burford follows:]

MAR 14 1988

STATEMENT OF ROBERT F. BURFORD, DIRECTOR, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR BEFORE THE COMMITTEE ON ENERGY AND NATURAL RESOURCES, UNITED STATES SENATE, ON H.R. 1860, AN ACT ENTITLED THE "FEDERAL LAND EXCHANGE FACILITATION ACT OF 1987".

I appreciate the opportunity to appear here today to discuss the views of the Department of the Interior on H.R. 1860.

We support the concept of improved procedures for Federal land exchanges. However, we strongly oppose H.R. 1860 as currently drafted because it falls short of accomplishing this objective, and because it contains a provision that the Department of Justice has advised is unconstitutional. If this legislation is enacted in its current form, we would recommend that the President veto the bill. However, we submit for your consideration and support a substitute bill that provides for procedures that will truly expedite the exchange process.

H.R. 1860 proposes to improve the efficiency by which the Federal Government accomplishes land exchanges. Specifically, it establishes timetables for steps in the exchange process, requires mandatory arbitration, and modifies the current Federal appraisal process.

We have three major problems with H.R. 1860. First, we believe the mandatory timetables set in the bill are unrealistic for some exchanges. A better approach is for the parties to the exchange to agree to a schedule because time needed for each exchange varies depending on the complexity of the individual exchange.

Second, we oppose the so-called mandatory arbitration provision in the bill. The Department of Justice has advised that compulsory arbitration by non-Federal officials would violate the Appointments Clause of the Constitution. While it may be desirable in some situations to utilize voluntary non-binding arbitration, we do not believe it is necessary or should be required in all cases where disagreements exist as to value.

Exchanges of federally-owned lands are required to be made in the public interest. We believe that the determination of the values of the lands or interests to be exchanged must remain with the appropriate Secretary and that outside evaluations should not be imposed on either the Secretary or the other party involved in the exchange. We presently use a variety of conflict resolution mechanisms to accomplish this same result. These include third party appraisers, blue ribbon panels, and, if appropriate, some type of voluntary arbitration.

Arbitration can be costly and time consuming. Moreover, the time and expense of arbitration would be wasted if, after completion of the process, the parties decide not to go forward with the exchange as H.R. 1860 would allow.

Finally, we object to the adjustment of relative values and the requirement that the regulations recognize that the parties in an exchange may agree that one party will assume, without compensation, all costs or other responsibilities or requirements ordinarily borne by the other party. "Costs and other responsibilities or requirements" is defined to include costs of

land surveys and appraisals, mineral examinations, archeological surveys and salvage, title searches, removal of encumbrances, arbitration, curing deficiencies preventing highest and best use, compliance with laws, regulations and policies applicable to exchanges, and other similar costs. The parties may then agree to make adjustments to the relative values assigned to the properties in the exchange, to compensate a party for assuming costs or responsibilities ordinarily borne by the other party.

We do not believe that the various administrative costs listed in H.R. 1860 should be used to adjust relative values. Agencies are entrusted with responsibility for administering the public lands in accordance with laws passed to protect the public interest. Therefore, there is no justification for discounting the value of the public lands because they are in public ownership. The rights and interests conveyed have a market value which is not diminished by agency administrative costs. In addition, it would be extremely difficult to control administrative costs paid by the non-Federal party should these costs be reimbursable with additional lands. In practice, the proper amount of reimbursement could very well become an issue that would further prolong the land exchange process.

Sections 6 and 7 would amend provisions of laws that apply only to the Forest Service. We support enactment of those provisions. They are also included in our draft bill.

We have no objection to the intent of the study identified in section 8 of the bill. This study would require the Secretary of the Interior to assess the need for improvements in existing methods of land surveying and mapping and of

collecting, storing, retrieving, disseminating and using information about Federal and other lands. We agree that there is a need for better coordination of Federal land information activities and are actively working toward this end. A properly focused study looking to the future could provide a means of enhancing this coordination. Efforts already underway or which could be initiated administratively will accomplish this same goal. Congressional direction for improved coordination of land information system developments leading to the adoption of national standards for data transfer and exchange might be more effective in actually achieving the desired goal in a timely manner. However, with the great momentum already underway in this area, immediate attention to this issue is critical. For this reason we have not included the study provision in our substitute bill.

Attached to our statement is our proposed substitute bill which addresses our concerns and provides additional authorities which will truly expedite the exchange process in several ways:

First, the bill would authorize exchanges of Federal lands of not more than $150,000 to be made for approximately equal value without formal appraisals as long as the exchange is based on a statement of value by a qualified appraiser. This is similar to the provision in H.R. 1860. In addition, it would permit exchanges of land of not more than $500,000 in value or 5,000 acres to be made at approximately equal value without any cash equalization. The differential can be no more than 3 percent of the value of the Federal lands. This provision will minimize the conflicts which arise in attempting to establish equal values. It will eliminate the necessity for making significant cash payments to equalize values in smaller exchange situations, while still protecting the public interest.

Second, the bill would authorize the appropriate Secretary to use a variety of voluntary approaches to resolve disputes as to land values including fact-finding non-binding arbitration and mediation. This gives flexibility to negotiate values while not subjecting the parties to unnecessary mandatory requirements which could be unconstitutional.

Finally, our substitute draft bill addresses several matters both included and not included in H.R. 1860, such as a finite time for opening lands to the operation of the mining laws, including the mineral and geothermal leasing laws, a provision allowing for simultaneously executed documents of conveyance to be held in escrow where necessary, and as I said earlier several provisions allowing for expedited exchanges by the Forest Service.

This concludes my prepared statement. I will be pleased to answer questions.

A B I L L

To expedite exchanges by the Federal Government and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "Federal Land Exchange Act of 1987."

Sec. 2(a) The Congress declares that it is the policy of the United States that land exchanges should be used by Federal land managers wherever possible to consolidate Federal, State, and private holdings of land or interests in land in order to achieve more efficient management for important objectives including the protection of fish and wildlife habitat and aesthetic values, the enhancement of recreation opportunties, the consolidation of mineral and timber holdings for more logical and efficient development, the expansion of communities, the promotion of multiple-use values, and fulfillment of public needs.

(b) The major purposes of this Act are to grant authority to the Secretary of the Interior and Agriculture to—

(1) facilitate and expedite land exchanges pursuant to the Federal Land Policy and Management Act of 1976 and other laws applicable to exchanges by the Secretaries of the Interior and Agriculture; and

(2) provide for voluntary approaches to resolve differences between the parties as to the value of lands or interests in lands being considered for exchange.

Sec. 3. The first sentence of section 206(b) of the Federal Land Policy and Management Act of 1976 (43 USC 1716(b)) is hereby amended to insert the word "concerned" after the words "the Secretary."

Sec. 4.(a) Section 206(c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716(c)) is hereby amended to read as follows:

> "Lands acquired by the Secretary by exchange under this section which are within the boundaries of the National Forest System, the National Park, Wildlife Refuges, Wild and Scenic Rivers, Wilderness, Trails, or any other System established by Act of Congress shall, upon acceptance of title, immediately become a part of the System for which they were acquired, without further action by the Secretary, and shall be subject to all the laws, rules and regulations applicable to the System of which they have become a part."

(b) Sec. 206 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1716) is amended by adding subsections (d) through (g) as follows:

> "(d) Notwithstanding the provisions of subsection (b) of this section and other applicable laws which require that exchanges of lands or interests therein be for equal value, where the Secretary concerned determines it is in the public interest and that the consummation of a particular exchange the Secretary concerned may exchange will be expedited thereby, lands or interests therein which are of approximately equal value in cases where --

"(A) the combined value of the lands or interests therein to be transferred from Federal ownership by the Secretary concerned in such exchange is not more than $150,000 and

"(B) the Secretary concerned finds that a determination of approximately equal value can be made without formal appraisals, and is based on a statement of values by a qualified appraiser approved by an authorized officer.

"(e) Notwithstanding the provisions of subsection (b) of this section, in exchanges where the Federal lands being exchanged do not exceed 5,000 acres or $500,000 in value, the Secretary of the Interior or the Secretary of Agriculture may exchange lands and interests in lands that are of approximately equal value, without requiring cash equalization, when the public benefits to be derived justify consummation of an exchange. In making exchanges pursuant to this subsection, the appropriate Secretary shall: (i) identify the public benefits to be derived; (ii) document the scope and quality of those public benefits; (iii) determine the potential cost savings to the government from the exchange and from each of the public benefits; and (iv) limit the differential in approximate values to no more than 3 per centum of the total dollar value of the Federal lands or interests in land being exchanged. The Secretary concerned shall try to reduce the differential to as small an amount as reasonably possible.

"(f) Federal lands or interests in lands proposed for exchange pursuant to this Act shall be segregated for a period of 2 years from all forms of appropriation under the public land laws including the mining, mineral leasing and geothermal steam laws, upon the publication of a notice in the Federal Register. The Secretary is hereby authorized to extend the segregation one time for a period of not to exceed 2 years. After the expiration of the period of segregation, Federal lands not conveyed in the proposed exchange shall be automatically restored to the status that existed prior to segregation and open to operation of the public lands laws including the mining, mineral leasing and geothermal leasing laws.

"(g) Non-Federal lands or interest in lands acquired pursuant to this section, except those within the boundaries of units of a national system described in subsection (c) of this section, shall be opened automatically to the operation of all public land laws, including the mining, mineral leasing and geothermal steam laws, at 12 o'clock noon on the 181st day after acceptance of title by the Federal government, unless before that 181st day the Secretary publishes in the Federal Register an order maintaining the closure in whole or in part and describing any limitations on use of the lands that are opened."

Sec. 5. Section 208 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1718), is amended by designating the existing paragraph as subsection (a) and adding a new subsection (b) to read as follows:

"(b) All documents conveying lands and interests therein pursuant to this Act shall be issued and exchanged simultaneously unless the parties mutually agree otherwise. Where necessary the documents of conveyance shall be placed in escrow pending title search of land being acquired by the Federal Government, to be conducted by the appropriate Secretary, to assure that the United States is acquiring clear title. In the event that the appropriate Secretary finds that the title to the property to be conveyed to the United States is not acceptable, the conveyance documents placed in escrow shall be returned to the originators and the Secretary or his designee is authorized to cancel the United States document of conveyance."

Sec. 6. In the resolution of disputes concerning value between the exchange proponent and the Secretary having management responsibility for the land, the Secretary shall consider cooperative, voluntary approaches for resolving disputes of value including, but not limited to, fact finding, nonbinding arbitration, mediation or other conflict resolution procedures which would facilitate agreement within a mutually agreed time.

Sec. 7. Section 17(b) of the National Forest Management Act of 1976 is hereby amended by deleting "$25,000" and inserting in lieu thereof "$250,000".

Sec. 8. The Act of July 26, 1956 (70 Stat. 656, 16 U.S.C. 505a, 505b) is hereby amended as follows:

(a) The words "national forest lands" are hereby deleted wherever they occur, and the words "National Forest System lands" are inserted in lieu thereof.

(b) The words "a national forest" are hereby deleted in the first paragraph, and the words "a unit of the National Forest System" are inserted in lieu thereof.

(c) The following sentence is hereby added at the end of the second paragraph: "Lands interchanged under the authority of this Act shall be deemed to include interest in lands.".

Sec. 9. The Act of December 4, 1967 (81 Stat. 531, as amended; 16 U.S.C. 484a) is amended as follows:

(a) The words "or individual" are hereby inserted after the words "school authority" whenever they appear.

(b) The following paragraph is inserted after the second paragraph: "In addition, the Secretary of Agriculture, in exchanges under this authority involving individuals, may utilize covered funds upon deposit when appropriated, to acquire replacement National Forest System lands or interests in lands. Exchanges under this authority involving individuals shall be limited to conveyance and acquisition of national forests or national forest purchase unit lands.

Sec. 10. Nothing in this Act shall be deemed to amend the Alaska Native Claims Settlement Act (43 U.S.C. 1601) or the Alaska National Interest Lands Conservation Act (16 U.S.C. 3101).

Sec. 11. If any provision of this Act or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby.

Senator WIRTH. Thank you very much, Mr. Burford. Mr. Leonard?

STATEMENT OF GEORGE M. LEONARD, ASSOCIATE CHIEF, FOREST SERVICE, DEPARTMENT OF AGRICULTURE

Mr. LEONARD. Thank you, Mr. Chairman. The present land ownership patterns on the public lands of the West are more an accident of history than of purposeful design, as you well know. Land exchanges represent an affective way to rationalize this land ownership pattern and make the management of our public lands more effective and efficient. Land exchange should continue to be a primary means of acquiring lands needed to meet National Forest Purposes, including acquisition of lands in congressionally designated areas. The land exchange process is not simple. Finding properties of relatively equal value is difficult enough, and when that is added to a rather cumbersome process, many desirable exchanges are lost or simply take too long. There is a need to streamline the process and make it more efficient.

H.R. 1860 represents a meaningful move to do so. We agree in concept with the measures set forth in the bill, although we have problems with some specific provisions. We would support the legislation, if amended to conform with the Administration's position.

Mr. Chairman, we would be pleased to work with the Committee staff in addressing those kinds of problems and I'm prepared to respond to any questions you have.

[The prepared statement of Mr. Leonard follows:]

STATEMENT OF
GEORGE M. LEONARD, ASSOCIATE CHIEF
FOREST SERVICE
UNITED STATES DEPARTMENT OF AGRICULTURE

before the
Subcommittee on Public Lands, National Parks and Forests
Committee on Energy and Natural Resources
United States Senate

Concerning H.R. 1860

March 14, 1988

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to present our views on the "Federal Land Exchange Facilitation Act of 1987."

We wish to emphasize our strong support for the concept of this legislative proposal. We agree with the proponents of H.R. 1860 in the need to streamline the land exchange process and become more efficient at processing land exchange cases. Land exchanges should continue as the primary means of landownership adjustment. They should continue to be the preferred method of acquiring land needed to efficiently manage the National Forest System rather than that of direct purchase.

Although the Department of Agriculture concurs in principle with the purposes of H.R. 1860 we object to the bill as it is currently written, but would support the legislation, if amended to conform with the Administration's proposed bill.

We note that H.R. 1860 is an improvement over a similar bill, H.R. 4814, which was considered by the 99th Congress. We also recognize that the House passed

H.R. 1860 with amendments which incorporate some of our recommendations included with our substitute bill. We feel that H.R. 1860 could be significantly improved and therefore strongly encourage additional amendments.

One area of concern with H.R. 1860, which we noted in our testimony before the House of Representatives, is the provision for mandatory arbitration. The Department of Justice advises that the arbitration mechanism of H.R. 1860 would violate the "appointments" clause of the Constitution. We have provided an alternate solution to provide for nonbinding arbitration and other voluntary approaches to dispute resolution.

We recommend a number of amendments to H.R. 1860, which would provide additional savings both in completion times and costs of land exchanges. These amendments are included in the Administration' substitute bill.

This concludes my prepared testimony. I shall be pleased to answer any questions that Members of the Subcommittee might have.

Senator WIRTH. Good, Mr. Leonard. We appreciate your willingness to do so and do look forward to working with you in the Forest Service, and I would assume BLM, and the Justice Department. Let me start, by asking if Senator Melcher has any opening statement he would like to make or questions that you would have of the panel?

Senator MELCHER. I do have some questions.

Senator WIRTH. No opening statement. Senator Wallop?

Senator WALLOP. I have some questions that I will ask now, and some I may submit.

Mr. Leonard, both of you mention the problem with the mandatory timetables, saying they are unrealistic for some exchanges, and go on to say a better approach is for the parties to agree to a schedule. The bill requires that within 90 days of reaching an agreement to initiate a land exchange, the Secretary concerned will make the arrangements with the parties involved for an appraisal, and under current law this will be established in the negotiations between or amongst the parties.

It seems that the negotiated schedule would consider complexity of national exchanges, as well as the length of time required. Doesn't that provide a better approach?

Mr. BURFORD. We don't believe so because we find some exchanges that are fairly large can be made in a relatively short time. For instance, the San Pedro, AZ, land exchange was initiated in August 1984 and completed in March 1985. In that exchange, BLM acquired 43,371 acres and we conveyed out 40,947 acres. The value of each piece of land was $26.5 million dollars. But, there were no mining claims that had to be settled. Titles to the lands were in good shape and the exchange was able to proceed quite expeditiously.

Senator WALLOP. But the problem is, the timetable in the bill is not mandatory. It's to be negotiated amongst the parties, but it does get you initiated into it.

Mr. BURFORD. That's not the way we're interpreting it. We're interpreting it as being a rather mandated timetable.

Senator WALLOP. As I read it, it requires within 90 days of reaching an agreement to initiate an exchange. The Secretary will make arrangements with the parties involved for an appraisal and as under current law, will be established through negotiations between or among the parties.

Senator WIRTH. We have attempted to point this out over and over and over again, to BLM and you all keep coming back with what we think is just an incorrect reading of the language. Maybe we could ask you to give us what language you think would clarify this. Would you do that? It seems to me that the reading that Senator Wallop is defining is exactly the reading of Senator Bumpers and me and everybody on the committee. Somehow we have not been able to get across to BLM what this language means. Now, maybe you would come back to us and tell us why you have a problem.

Senator WALLOP. I would not be in favor of something that's so rigid as a 90 day time frame. I've been involved in too many business deals of my own without the complications of a government

program. It is unthinkable that we would impose a 90 day rigid timetable to complete a transaction of this nature.

Mr. BURFORD. I'll furnish that for the record, along with any suggested changes.

[The information follows:]

The flexibility in establishing timetable under H.R. 1860 is predicated on agreement between the parties. If there is agreement between the parties there will be no problem with adjusting the legislatively scheduled times for appraisals or other activities in the exchange process. However, the problem occurs when negotiations fail and there is no agreement between the parties. Then the time constraints are mandatory. For instance on page 4 of H.R. 1860, beginning at line 5, the new subsection (d)(1) that would be added to section 206 of FLPMA provides "unless it is mutually agreed prior to the expiration of 90 days after entering an agreement to initiate an exchange. . . . no later than 90 days after entering such an agreement the Secretary concerned and other party or parties. . . . shall arrange for an appraisal . . ." (underscoring supplied)

Again on page 4 starting at line 14 "If within 180 days after submission of an appraisal or appraisals for review . . . the Secretary concerned and the other party or parities cannot agree to accept the findings of an appraisal . . . the appraisal shall be submitted to an arbitration . . . binding . . . insofar as concerns the value of the lands . . ." (underscoring supplied)

The fact that the parties can withdraw from the exchange does not lessen the burden of madatory time schedules nor does the language of the bill appear to allow the parties to withdraw from the exchange without complying with the mandatory provisions.

The opportunity to use other methods of conflict resolution also depends on mutual agreement of the parties. Failure to agree triggers the mandatory time schedules and procedures.

In addition, as I indicated in my March 23, 1988, letter to Senator Johnston, the terms "entered into an agreement to initiate an exchange" and "arrange for an appraisal" are not precise enough to use as a basis for a time schedule for parties who cannot agree on their own as to issues raised in the exchange proposal.

Senator WALLOP. Second, you spoke to the issue of mandatory or compulsory arbitration for the appraised values of lands in dispute. If either party is dissatisfied, they can agree not to agree and the process stops. Or, they may mutually agree to substitute bargaining or some other conflict resolution, such as the third party arbitration, or the use of blue ribbon panels.

Again, how is this so different? Outside of determining the appraised value of a piece of property, how does this become mandatory or compulsory arbitration?

Mr. BURFORD. Maybe that's another place where we are reading it different and I'll show you our substitute language.

[The information follows:]

The difference between the authority to resolve disputes concerning value that appears in section 6 of our draft bill and the provisions in H.R. 1860 is that our language is discretionary and does not provide for a fall back to mandatory binding arbitration. It does not require the parties to an exchange to go through additional procedures before they can terminate the exchange process. H.R. 1860 has all of those requirements. We consider this a significant difference that make the provisions of H.R. 1860 unacceptable.

Senator WALLOP. Because, the way I read it, you are under no obligation to initiate a land exchange and you're under no obligation to continue it. If you don't like something about it, you just walk away and there's no exchange. If both parties can agree, for example, that they haven't found a common ground, as is sometimes the case with the National Park Service, oftentimes both parties agree to go to arbitration.

I don't want to put a mandatory process in here because I don't think that's an exchange. I think that's a condemnation. I'm very much in favor of this exchange concept, as you well know.

Mr. BURFORD. I recognize that you're much in favor of it.

Senator WALLOP. I don't want it to become a condemnation process. I want it to be an exchange amongst people willing to do business, both on the side of the government and on the side of the individuals.

Senator WIRTH. Apparently the Justice Department has come in and made the argument for you all that this is, as I understand what you said and they've said previously, that this violates the appointments clause of the Constitution. Maybe we could get the Justice Department and you could ask them to tell us why, if in the law, as Senator Wallop points out, the parties don't have to accept the arbitration.

How does that then, with that out why is that a violation of the appointments clause? How can they say it's a violation, even though there's this kind of an out that gives them the opportunity to get out of it?

Mr. BURFORD. I'll get a written answer to that from the Justice Department, as to their reason.

[The information follows:]

Attached is the letter from the Justice Department to Senator Johnston on the issue of binding arbitration.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General Washington, D.C. 20530

March 28, 1988

Honorable J. Bennett Johnston
United States Senate
Washington, D.C. 20510

Dear Senator Johnston:

This presents the views of the Department of Justice on H.R. 1860, the Federal Land Exchange Facilitation Act of 1987. Although the Department supports H.R. 1860's objective of streamlining procedures for the exchange of federal and private property, we must oppose the bill in its present form. Section 3(a) of the bill would impose binding arbitration on officers of the executive branch in disputes with private parties over the value of land. H.R. 1860, sec. 3(a), amending sec. 206 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1716. We believe that this provision would violate the Appointments Clause of the Constitution. U.S. Const., art. II, sec. 2, cl. 2.

The Constitution requires that any appointee exercising significant authority pursuant to the laws of the United States is an "Officer of the United States" and must be appointed pursuant to the Appointments Clause. Buckley v. Valeo, 424 U.S. 1, 126 (1976). The Appointments Clause requires that all officers of the United States be appointed by the President, the heads of the Departments, or a court of law. Id. at 125. As presently drafted, H.R. 1860 would require the Secretaries of Interior and Agriculture to submit disputes with private parties over the price of certain lands "to an arbitration to be conducted in accordance with the real estate valuation arbitration rules of the American Arbitration Association. Such arbitration shall be binding on the Secretary . . . ." H.R. 1860, sec. 3(a) (emphasis added), amending FLPMA, sec. 206(d)(2).

We believe that the final determination of the value of land that the federal government owns or is going to exchange for federal land of equal value is a significant government function within the meaning of Buckley, supra, 424 U.S. at 126, 141. Land is a valuable federal resource and it is the Secretaries, as officers of the United States, who are accountable for its valuation and transfer. Therefore, an arbitrator who can issue a determination on the value of the land that is binding on the Secretaries would be executing the law. Accordingly, the arbitrator must be appointed pursuant to the Appointments Clause. Section 3(a) of the bill, however, makes no reference to the appointment of the arbitrator by the President or any other member of the Executive branch, so we must assume that the arbitrator will be appointed in conformity with the rules of the

American Arbitration Society rather than the Appointments Clause. Unless H.R. 1860 is amended to provide for the appointment of the arbitrator as an Officer of the United States, the Department of Justice will recommend to the President that he veto this bill if it reaches his desk.

The Office of Management and Budget has advised this Department that enactment of H.R. 1860 as currently drafted would not be in accord with the program of the President.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

Senator WALLOP. Not only do they not have to go through with the exchange, but if the Secretary doesn't like the consequences of the arbitration, he can pull out after that. Again, I intensely dislike this whole business of condemnation. I've disliked it ever since this whole process began and I became a member of this committee. And, one of the things I would not have consciously been a party to is extending that power.

By the same token, I wouldn't want to extend the power of a mandatory Federal decision from some third party. I don't think it's in here and it's my desire that it not be. Again, we could work on it with you.

Mr. BURFORD. Senator, I would point out, in the years 1981 to 1987, the Bureau of Land Management has consummated exchanges whereby we received 2,077,000 acres and transferred 1,587,000 thousand acres, which I don't think is a bad record over seven years, I consciously made the decision because I have heard the complaints from people throughout the West that no exchanges were being made and I knew that there is a method in FLPMA I delegated the authority to the State directors to sign off on those exchanges and as a result there has been some improvement. Maybe it's not enough improvement, but if you give me enough leeway, I may trade off all the lands that belong to BLM and then I'll be out of a job.

Senator WALLOP. I think that BLM, and I think, as a matter of fact, the Federal Government generally has been doing a pretty good job on these things. One of the things that we did not want to do is to either enhance or diminish the characteristics of either sides 'legal arguments in the lawsuit. It has been my effort and, in fact, my resistance to moving earlier. I didn't want to do that. I didn't want to give anybody the no-go say on other legitimate government exchanges.

I think you have done a good job in exchanges. I think more can be done. I think it is a better way of travelling than a lot that we have done in the past, and I believe that rather than acquire a whole lot of new government fee title, that it's clearly a way in terms of tight budgets and other things. It is creative and imaginative and I'd want to work through the Tax Code for some processes.

Anyway, I want to recognize what you said, that the exchange process is moving remarkably well.

Senator WIRTH. Thank you. Senator Melcher?

Senator MELCHER. Bob, what are most of your exchanges?

Mr. BURFORD. A lot of them are with States. We've had the Navajo-Hopi exchanges which were mandated by Congress, which had languished for three or four years and Senator Goldwater, when he interviewed me, said he bet that I couldn't get it done in a year. I said, if you'll confirm me, I'll get it done in a year. It took just a little bit over a year, but I almost met the target.

Senator MELCHER. Did you do that under provisions of the Navajo-Hopi bill or under FLPMA?

Mr. BURFORD. Under the Navajo-Hopi bill, it took some restrictions away that I didn't have to conform to.

Senator WALLOP. Will you yield for half a second? Mr. Chairman, I would like to put in the record the list of states and the acreage,

both of recreation and conservation exchanges that have taken place over the last six years.

Senator WIRTH. Without objection, it will be included in the appropriate spot in the record.

Mr. MELCHER. Other than that, what problems have you had with FLPMA on exchanges?

Mr. BURFORD. As I stated in my opening statement, the Bureau's record shows that we are making exchanges. We are making exchanges between private parties. We are making exchanges for State lands. The reason we have so many exchanges in Arizona is because of the provisions in the Central Arizona Project that the Bureau of Land Management makes up for all the State lands which are taken away by the construction of that project. It has amounted to a considerable amount of acreage in the State of Arizona.

But, if you look at the list which was submitted by the Senator from Wyoming for the record, you'll find that we're making exchanges in every State.

Senator MELCHER. That doesn't tell me why you need a bill.

Mr. BURFORD. I did not ask for the bill.

Senator MELCHER. You don't need one, as far as you're concerned?

Mr. BURFORD. I'm happy to conform with FLPMA.

Senator MELCHER. Mr. Leonard, what are your problems?

Mr. LEONARD. Frankly, most of our problems, relative to land exchanges, have been in complying with NEPA and related laws, and the controversy that's often associated with that activity.

Senator MELCHER. What bills?

Mr. LEONARD. Endangered Species Act and other Acts, wherein you have to meet the procedural requirements of those laws before you can proceed with the exchange.

Senator MELCHER. This isn't going to change that?

Mr. LEONARD. H.R. 1860 won't have any effect on it at all.

Senator MELCHER. In other words, you don't have a problem?

Mr. LEONARD. The land exchange process is very cumbersome and we have had situations where we have not been able to complete land exchanges in a timely manner, in order to meet the private proponent's timetable.

Senator MELCHER. What is the purpose of wanting exempt the $150,000 exchange from fair market value?

Mr. LEONARD. The purpose is not to exempt that exchange from fair market value.

Mr. MELCHER. How are you going to establish fair market value on this vague term, based on the statement of value by a qualified appraiser? I don't understand that. That must be something different than fair market value?

Mr. LEONARD. No, the objective is the fair market value. It's simply that the documentation that would be associated with that would be less than that which would be associated with a higher value exchange.

Senator MELCHER. In other words, some qualified appraiser. I use qualified appraiser because that's the terms used, if something different than what you have in the forest service.

Mr. LEONARD. No, we have qualified appraisers, as does the Bureau of Land Management.

Senator MELCHER. Is that what you mean then, one of the BLM or Forest Service Appraisers?

Mr. LEONARD. Yes, sir.

Senator MELCHER. That's what you're testifying for, both of you?

Mr. LEONARD. A private appraiser may also be qualified, but in terms of these exchanges, we are really talking about a Forest Service or BLM appraiser.

Senator MELCHER. Is that correct?

Mr. BURFORD. Yes. But, if we have too many exchanges, we do use the services of outside appraisers occasionally in the Department of the Interior.

Mr. LEONARD. If I may, I think the concept there is to recognize the level of documentation that is necessary for a relatively low value exchange, can be less and logically should be less than a high value exchange.

Senator MELCHER. As I recall, does FLPMA language govern Forest Service?

Mr. LEONARD. We have our own exchange authorities.

Senator MELCHER. But what are you basing that on, what's in FLPMA or what?

Mr. LEONARD. The General Exchange Act.

Senator MELCHER. FLPMA doesn't affect that?

Mr. LEONARD. No, sir.

Senator MELCHER. We think it does, but let's straighten this out.

Mr. LEONARD. It supplements it to some extent, but the basic authority for a National Forest Exchange comes from the General Exchange Act.

Senator MELCHER. Isn't that simply based on fair market value?

Mr. LEONARD. Yes, sir. Both properties.

Senator MELCHER. I'd like to understand this, because if it ain't broke, I don't want to fix it. If this term, $150,000 or less is valued by a qualified appraiser and if that still meets fair market value, I don't see where you save any time.

Mr. LEONARD. The objective in each case is to get fair market value. The question was the level of documentation and how much supporting data needs to be given in order to document the process by which you get estimates of fair market value.

Senator MELCHER. I don't think FLPMA takes all that much language to say to get fair market value and you can exchange it if you can get it, and it's to the advantage of the United States. Where do you get all this documentation? Through your regulations or something?

Mr. BURFORD. Through the Endangered Species Act?

Senator MELCHER. This isn't going to exempt any of that, is it?

Mr. BURFORD. No, sir.

Mr. LEONARD. Mr. Melcher, maybe we can respond to that question in writing, as to what the specific responsibilities are for documentation.

Mr. MELCHER. You know, what you're doing is testifying that you've got a bill here somewhere. You're testifying in favor of a bill, which there's 11 different sections and it says to expedite. I want to know what you're expediting. I don't see anything magical

about $150,000 or less changing anything, if you've got to get fair market value.

Mr. LEONARD. Senator, both Director Burford and I are testifying in opposition of this bill.

Senator MELCHER. Well, you've got a bill here, submitted on behalf of the Administration to expedite by the Federal Government and private purposes, and any time I see any draft language come up here, I have to thank you're for it.

Mr. BURFORD. Sir, that bill is not before this panel.

Senator MELCHER. I know it isn't but you're testifying in favor of this bill.

Mr. BURFORD. We think that bill would clarify some points, but FLPMA does not require fair market value. FLPMA requires equal value. It has been our policy in the Department of the Interior and in this Administration that we would make no exchanges that were not to the advantage of the United States.

Senator MELCHER. I see where your language here amends FLPMA, say notwithstanding the provision and other applicable law would require exchanges of land or interest be of equal value, et cetera, and then you give this special deal for $150,000, and to do it without formal approval, on a statement of values by a qualified appraiser. You know, I don't quite understand this. And then you go on to the next one and you're talking about $500,000 or less.

To me, that's quite a bit of money. You'd have all kinds of little deals.

My concern, I guess, is just this. If it isn't necessary, why include these special categories?

Mr. LEONARD. Two things that these do. The $150,000 limitation provides for exchanges of land that are approximately equal in value. At those very small, these relatively small exchanges, it's difficult to get two tracts of land that are precisely equal in value. What this authorizes to do, is if the Secretary or the government and the proponent agree that this exchange is a good exchange and that the values are approximately equal, without a tremendous amount of documentation, if both parties are willing, you can go ahead and conclude the exchange.

Now, in the case of the $500,000 limit, what that says, if the exchange is less than $500,000 in value, and there is a differential of less than three percent, the two parties can go ahead and conclude the exchange without the necessity of making a cash equalization payment.

Senator MELCHER. I'm going to let that rest for a moment. What about mineral?

Mr. BURFORD. Mineral exchanges? We treat them the same as other exchanges. We take them into account in the evaluation system and in some cases we do exchange minerals for surface. In some cases, if we were exchanging land, which was of no known mineral value, we would probably let the minerals go. But, if there are any mineral values, we would retain the minerals.

Senator MELCHER. Let's take you first, then, Bob. The land that you're going to exchange for, the minerals are known by the owner, and you don't know what the minerals are in BLM land. What are you going to do?

Mr. BURFORD. We have to make a determination on the value of those minerals before going to——

Senator MELCHER. You don't know what's there.

Mr. BURFORD. We don't know what's there. We'll probably retain the minerals and allow them to retain their minerals and exchange surface only.

Senator MELCHER. I would think so.

Mr. BURFORD. We do have exchanges, Senator.

Senator MELCHER. You know, part of this documentation that Mr. Leonard talked about is what are the minerals, or does anybody know?

Mr. BURFORD. Well, we have never exchanged any minerals that we didn't have a pretty good idea what the valuation is. There's an exchange going on in Wyoming right now which is taking considerable time. It's for a scenic easement inside a national park and the proponents would like to receive coal. We have gotten an assessment on the scenic easement and we now have a team working on an assessment of the coal to see that they are equal in value or we will exchange an equal value amount of coal for the valuation, as placed on that scenic easement.

Senator MELCHER. What is the normal process now, Mr. Leonard, of exchanging some of this land, $500,000, million dollars worth of of land, of Forest Service, and how it's presented.

Sometimes I see some pretty high class expensive lawyers approaching the Forest Service on these exchanges. How is that taken into account or do you bother, or can you?

Mr. LEONARD. The cost of the exchange are not presently taken into account. In other words, we're simply valuing the Federal land that will be given up to the proponent and the land that will be acquired by the Federal Government, in an attempt to get equal values of land and the cost to the parties of the exchange are not reflected in those transactions.

Senator MELCHER. Does it bother you, seeing a million dollars worth of land exchanged, and you know some lawyer at some law firm is in there for $150,000? That's 15 percent.

Mr. LEONARD. In the terms of the process we are currently using, that doesn't affect values of exchange. If we were acquiring a million dollars worth of land, it wouldn't make any difference how much money the proponent might have spent on their land. We would be acquiring a million dollars worth of land, based solely on land valuation principle.

Now, one of the things this bill would do is, if you had some costs associated with clearing the government exchange, for example the cost of an archeological examination of the government exchange, then that cost, which is an obligation for the government, could be reflected in the exchange value.

Senator MELCHER. I don't understand how some people can read—I'll have to ask somebody like Mike Harvey anyway, but on this arbitration language, is the Justice Department saying that it's unconstitutional on the basis that it isn't in the best interest of the United States to enter into arbitration?

Mr. LEONARD. It is my understanding, and I'm not a lawyer, that the Justice Department finds that to be a violation of the Appointments Clause of the Constitution. And, as I say, I'm not a lawyer.

Senator MELCHER. One final question. Does any of this have to do with Forest Service access?

Mr. LEONARD. No, sir.

Senator MELCHER. Could it?

Mr. LEONARD. Presumably, we could use exchange authority in order to acquire rights of way or access, but there's nothing in the bill that specifically addresses access.

Senator MELCHER. Is that a problem? In the bill, is access a problem for the Forest Service?

Mr. LEONARD. Yes, there are some areas where access to public lands can be a problem.

Senator MELCHER. It seems to be the biggest problem we've got right now in Montana.

Mr. LEONARD. It's certainly getting an awful lot of attention out there.

Senator MELCHER. Do you have some more problems with BLM land?

Mr. BURFORD. Yes, sir, and we have used the exchange to solve some of those problems.

Senator MELCHER. Thank you both very much. Thank you, Mr. Chairman.

Senator WIRTH. Thank you. Thank you, gentlemen. It seems to me that we've got three problems that have been annunciated by you and your agencies in their testimony. It is the intention of the Committee to mark this legislation up a week from Wednesday and so what we would like from you, if we could, particularly Bob from you, is the specifics on the issues that we've talked about, one, on the question of a timetable and your exchange with Senator Wallop, there seemed to be a difference of opinion, in what was meant by the language, and if you could give us your interpretation as to why you have a problem with our language, we'd like to hear that.

Second, there's a problem on the compulsory arbitration language, which isn't your problem, but DOJ's problem and you were just referring to that, Mr. Leonard, in your exchange with Senator Melcher, and if we could get you to get from the Justice Department that language right away as to what their problem is and why, since there is an out and they don't have to accept that arbitration, why does the Justice Department still feel that that violates the appointments clause?

[The Department of the Interior submitted the following:]

The provision on page 7 of H.R. 1860 that would be added to section 206 of FLPMA as subsection (f)(2)(B)(ii) allows the parties to an exchange to make adjustments in the values of properties involved in the exchange to compensate a party for assuming administrative costs ordinarily borne by the other party. Costs that are borne by the Federal Government are normally addressed in the budget appropriation process. Allowing the Federal Government to compensate the other party to an exchange for handling administrative functions by transferring and increased amount of land rather than paying cash for those services is a method of evading the appropriation process and in effect eliminating congressional review of the agency's budget with regard to those elements of expense. That is why I call it back door financing.

Senator WIRTH. And, third, you mentioned in your testimony, Bob, and your people have mentioned before, the problem that they had on the adjustment and the fact that that might be a back door

appropriation, that was the third problem that you all had mentioned. If you could get to us by the close of business this week, that would be very helpful. I don't think this is an onerous request. I think it's all been done as a matter of packaging it. We've all been through this over and over and I think these are the three issues that remain out there on the legislation. I think we could ask you to get that to us by the close of business on Friday and then we could put that into legislative language as appropriate or decide not to, as appropriate, so that we could go ahead on Wednesday. Does that make sense as a timetable?

Mr. LEONARD. We'll certainly try to do that.

Senator WIRTH. Mr. Burford, I think most of that falls into your bailiwick, and I know you can't speak for the Justice Department and none of us would try to do so, but if you could urge them to get that language to us, that would be helpful. Gentlemen, thank you very much for being with us. We appreciate it.

Our second panel this morning includes three distinguished witnesses, Mr. Thomas Glass, Chairman of the Western Atlantic Exchange Company in Denver, Colorado, Mr. Destry Jarvis, the Vice President of Conservation Policy, National Parks and Conservation Association, Washington, and Mr. Mark Ray, Vice President of the Public Timber Council, National Forest Products Association, also Washington, D. C.

Gentlemen, thank you very much for joining us this afternoon. I know you are all familiar with the rules of the committee, in which your statements will be included in full in the record and we would ask you to summarize those in a fashion which you might think would be most helpful for the committee and our deliberations and the schedule that we're on. I think all of you were here and heard the exchanges earlier between Senator Wallop and the witnesses and then Senator Melcher and the witnesses, and my summary of what appear to be remaining problems in the legislation, and so if you could proceed with particular reference to those issues and any others that you see in the legislation, we appreciate it and we would also appreciate as ever your expediting and summarizing your comments, in an extraordinarily helpful fashion.

Mr. Glass, why don't you start?

STATEMENT OF THOMAS R.H. GLASS, CHAIRMAN, WESTERN LAND EXCHANGE CO.

Mr. GLASS. Thank you. Senator Wirth, Senator Melcher, members of the subcommittee, I appreciate this opportunity to provide the testimony on this legislation. I'm the chairman of the Western Land Exchange Company, a firm that is exclusively in the business of facilitating land exchanges, between the Federal Government and non-Federal parties. Prior to 1980, most agencies relied on land and water conservation funds to obtain the high priority lands, including access for acquisition.

Since 1980, land and water conservation fund monies have been substantially reduced. Present Land's staff, in both the BLM and the Forest Service seem to recognize land exchanges, as a principle mechanism for acquiring high priority properties. As the demand for exchanges in both the private and public sectors is increased,

the obstacles within the existing process have become more apparent and they've been magnified by administrative budget reductions.

As an attempt to remove some of these obstacles and to compensate for the budget cuts, S.1260 is badly needed. There are four principle components to S.1260. They are, number one, modification of the appraisal review process, to establish reasonable time requirements and a means for conflict resolution, two, delegation of survey authority to the Secretary responsible for management of the land in question.

Three, provision for payment, of necessary exchange transaction costs through adjustments to the relative values assigned to the exchange properties, and four, provision for funding to ensure continuity of the Federal land exchange process. In addition, we understand Senator Wallop will introduce an amendment providing for relief of certain exchanges in the court injunction in National Wildlife Federation v. Burford.

Let me speak briefly about each of these points. Number one, modification of the appraisal review process, and particularly, the provision on arbitration. It should be noted that the arbitration provision is binding on the appraisal, the value question only, and does not force either party to proceed or to consummate an exchange.

While I'm on arbitration, I'd like to mention also that arbitration is in the law in several other pieces of legislation. Number one, it's in the law on super fund, it's in the Amateur Sports Act, it's in the Railroad Retiree Employment Act, and arbitration is in FIFRA. As Walter McAllister, Division of Realty, U. S. Fish and Wildlife Service noted in the 1982 Congressional Hearing, because two properties are involved, there is more opportunity for value disagreement. Negotiations may be long and arduous. Often after much time and effort on exchanges, no agreement is reached.

Let me provide you with the following examples from Colorado. Number one, the Jetley Exchange. It was a small 40-acre for 40-acre exchange. Jetley involved two Forest Service appraisers. A Forest Service staff appraiser interpreted, under local zoning ordinances, that the non-Federal land contained two building sites. The Forest Service review appraiser believed only one building site was possible. The private proponent was unwilling to accept the lower appraisal assumption, and abandoned the exchange.

Jetley is relative merely as an example that appraisal differences can occur between agency staff, and is not necessarily just an indication of appraisers representing one side or the other. Arbitration probably would resolve the Jetley, although, it would have been interesting to see if this provision would be utilized.

MacGregor Ranch, Colorado. We are aware of the case of the MacGregor Ranch addition to Rocky Mountain National Park, in which arbitration was used successfully. The appraiser for the owner of the ranch has valued the property at $9 million, while the Park Service had valued the tract at approximately $4 million. Recognizing the wide disparity, the two parties agreed upon a third appraiser to review the appraisals and arbitrate the dispute. The arbitrator determined the Park Service appraisal to be correct, at

which point the private land owner agreed to sell the ranch to the Park Service at the $4 million dollar value.

Let me provide you with some examples of general appraisal time delays and exchanges that we've worked on. At the Koppers Exchange in Colorado, it took a year to obtain approval on the appraisal. Evans Exchange, one and a half years to obtain approval. Tamarron Exchange, two years to obtain appraisal approval. Sand Creek Exchange, two and a half years to obtain approval. Keystone Exchange, two and a half years to obtain appraisal approval. Vail Exchange, three years to obtain appraisal approval.

Clearly there's a problem with an appraisal review process that averages this long to completion. Timetables and arbitration as provided in S. 1260 would ease the significant delay.

Avon-Frisco Exchange. On December 9, 1987, the Chief of the Forest Service remanded a decision by Regional Forester Cargill approving the Avon-Frisco Exchange. The Chief determined the decision did not comply with the Secretary's Land Exchange Regs because appraisals were not complete. Regional Forester Cargill pointed out that the Forest Service Handbook, which has been incorporated into the Regulations, specifically recommends that appraisals be completed after issuance of a decision in controversial cases. Cargill further pointed out that appraisals had been approved in this case, but they had subsequently expired.

In essence, the Regulations contradict themselves. As a result of the remand, based upon conflicting regulations, tens of thousands of dollars and many months of effort was wasted.

Senator WIRTH. Let me ask you if—Senator Metcalf used to have a wonderful statement when he'd ask people to summarize his statement, as long as it was truly a summary of his statement. We will include your statement, in full, in the record, and what we really want to get at is, I think, that the rationale for the legislation is very clear, everybody agrees on that. The question that remains are what are some of the glitches that may exist in the legislation, and if you might address yourself particularly to those three, the timetable, compulsory arbitration, and adjustment issues, I think those are the remaining issues out there, if I read previous testimony and hear the Members of the committee.

Mr. GLASS. Yes, Senator Wirth. First of all, the delegation of the survey authority, in the spirit of cooperation with BLM, we favor deletion of this section and substitution of the House past study.

Senator WIRTH. So that would take care of the adjustment issue? It will be taken care of if we deleted the section in the legislation and accept the House past language, is that correct?

Mr. GLASS. No, Senator Wirth. The bill as introduced in the House, and as introduced in the Senate, provided for streamlining of the survey authority. Currently what happens in Forest Service land exchanges involving public domain lands is that the Forest Service acts as a broker with the Bureau of Land Management to conduct surveys. The Forest Service derives the authority to conduct the surveys and gets the instructions to do surveys and often contracts with the BLM to do surveys for the Forest Service.

The bill before you contains that provision, in the spirit of cooperation with BLM. That has been deleted and a study of this issue is currently in the bill.

Let me speak briefly about adjustment to transaction costs. I think that a couple of exchange cases can really demonstrate why it's important to have—for the Government to have—the discretion to reimburse the non-Federal parties' cost in bringing the Federal lands up to a merchant of title status, or a highest and best use status.

In the case of Breckenridge, we had an exchange involving quite a bit of land, high priority land for some lands within the city of Breckenridge. There is an unpatented mining claim on the Federal land. We're now in the fifth year of preparing for the contest of these mineral claims and it's the Forest Service budget that unfortunately is stuck with these costs. The Office of General Counsel has estimated it's going to cost $150,000 to $200,000 to contest this unpatented mining claim, so that the government can provide free title to its land at closing.

What, in essence, could happen, and our client had agreed to it, is that we could have negotiated with the unpatented mining claim and perhaps bought them out under some regulations that the Forest Service would come up with and pay $25,000 to $50,000 for that claim to go away, very similar to what you would do if there was a cloud on the title in a private transaction. It would have saved the government a lot of money.

In summary, we support all of this bill. It has passed the House twice, and we look forward to the Committee's attention.

[The prepared statement of Mr. Glass follows:]

WESTERN LAND EXCHANGE COMPANY
1884 GAYLORD STREET
DENVER, COLORADO 80206
(303) 394-4000

TESTIMONY OF THOMAS R.H. GLASS, CHAIRMAN
WESTERN LAND EXCHANGE COMPANY

Regarding S. 1260,
the Federal Land Exchange Facilitation Act of 1987
before the Senate Subcommittee on Public Lands
March 14, 1988

Members of the subcommittee, I appreciate this opportunity to provide this testimony on the Federal Land Exchange Facilitation Act, S.1260. I am Thomas Glass, chairman of Western Land Exchange Company, a Colorado corporation whose sole business is to facilitate land exchanges between the Federal government and non-Federal landowners. Western Land Exchange Company has been in business six years, and in that time, we have experienced numerous obstacles in dealing with the bureaucracy of the Federal land exchange program, many of which can be alleviated through passage of this bill.

Changes in land ownership adjustment policy under this administration have created an urgency for the legislation. Prior to 1980, most agencies relied on Land & Water Conservation Fund monies to obtain "high priority" lands identified for acquisition. If funds were not appropriated in any given year, it was still easier to request an appropriation the following year than to attempt an exchange. Because exchanges were fewer, Federal land disposals were fewer and, in our opinion, such disposals often were not a politically acceptable land management tool.

Since 1980, Land & Water Conservation Fund monies have been substantially reduced. Present lands staff in both the BLM and the Forest Service seem to recognize land exchange is now the principal mechanism for acquisition of high priority properties. As the demand for exchanges in both the public and private sectors has increased, the obstacles within the existing process have become more apparent, and they have been magnified by administrative budget reductions. As an attempt to remove some of these obstacles and to compensate for the budget cuts, S. 1260 is badly needed. Similarly, with the advent of Federal Land Policy & Management Act-authorized land management plans, criteria for acquisition and disposal have been delineated. Federal land disposals have become politically more acceptable, and recognition of the management benefits to be gained by disposal is growing.

There are are four principal components of S. 1260. They are:

1. Modification of the appraisal review process to establish reasonable time requirements and a means for conflict-resolution.
2. Delegation of survey authority to the Secretary responsible for management of the land in question.
3. Provision for payment of necessary exchange transaction costs through adjustments to the relative values assigned to the exchange properties.
4. Provision for funding to insure continuity of the Federal land exchange process.

In addition, we understand Senator Wallop will introduce an amendment providing for relief of certain exchanges from the court injunction in National Wildlife Federation v. Burford.

Modification of the Appraisal Review Process

Section 3(a)(d) of S. 1260 amends Section 206 of the Federal Land Policy and Management Act of 1976 (FLPMA) by adding subsection "d", which expedites the land appraisal process once the Federal government and a proponent have reached an agreement in principle (i.e., a Statement of Intent) to proceed with an exchange proposal. The key feature of this subsection is new language which provides for binding arbitration of appraisal disputes. Under existing law, such disputes often cause long delays or result in the termination of exchange efforts which are otherwise in the public interest. It should be noted that the arbitration provision is binding on the appraisal (value) question only, and does not force either party to proceed with or consummate an exchange. The language also allows waiver or delay of the arbitration requirement and appraisal timetables upon mutual agreement of the parties.

The Federal cutbacks have resulted in more contracted or non-Federal supplied appraisals. The use of private sector appraisers, coupled with the lack of adequate Federal appraisal rules and regulations, has led to a dramatic increase in misunderstandings and disputes in appraisal reviews. It has now reached the point where appraisal review is a major bottleneck in the exchange process.

As Walter McAllister, Division of Realty, U.S. Fish & Wildlife Service, noted in a 1982 Congressional hearing:

> "Because two properties are involved, there is more opportunity for value disagreement. Negotiations may be long and arduous. Often after much time and effort on exchanges, no agreement is reached."

Promulgation of new rules and regulations will serve to eliminate many of these misunderstandings. Arbitration as set forth in S. 1260 is a fair and universally recognized method of conflict resolution which provides a means to resolve those problems not solved by new rules and regulations.

We have several specific examples of the problems encountered in pursuing a land exchange transaction. Although our experience is limited to Colorado, we have spoken at length with other supporters of the bill, and it appears our experiences in Colorado are typical of the national situation. We provide the following examples:

1. Jetley Exchange, Colorado

A small, 40-acre for 40-acre exchange, Jetley involved two Forest Service appraisers. A Forest Service staff appraiser interpreted, under local zoning ordinances, that the non-Federal land contained two building sites. The Forest Service review appraiser believed only one building site was possible. The private proponent was unwilling to accept the lower appraisal assumption, and abandoned the exchange.

Jetley is relevant merely as an illustration that appraisal differences can occur between agency staff, and is not necessarily just an indication of appraisers representing different positions in a real estate transaction. Arbitration probably would resolve the Jetley case, although it would have been interesting to see if the agency would have utilized arbitration for its own appraisers.

2. MacGregor Ranch, Colorado

We are aware of the case of MacGregor Ranch addition to Rocky Mountain National Park in which arbitration was used successfully. The appraiser for the owner of the ranch had valued the property at $9 million, while the Park Service appraiser had valued the tract at approximately $4 million. Recognizing the wide disparity, the two parties agreed upon a third appraiser to review the appraisals and arbitrate the dispute. The arbitrator determined the Park Service appraisal to be correct, at which point the private land owner agreed to sell the ranch to the Park Service at $4 million value.

3. General Appraisal Time Delays

A sampling of Colorado land exchanges over the last several years illustrates the serious problem presented by the appraisal review process:

A. Koppers Exchange - 2 appraisers, 1 year to obtain approval

B. Evans Exchange - 2 appraisers, 1-1/2 years to obtain approval

C. Tamarron Exchange - 2 appraisers, 2 years to obtain approval

D. Sand Creek Exchange - 2 appraisers, 2-1/2 years to obtain approval

E. Keystone Exchange - 2 appraisers, 2-1/2 years to obtain approval

F. Vail Exchange - 2 appraisers, 3 years to obtain approval

Clearly there is a problem with an appraisal review process that averages over one year to complete. Timetables and arbitration as provided in S. 1260 will ease this significant delay.

4. Avon-Frisco Exchange, Colorado

On December 9, 1987, the Chief of the Forest Service remanded a decision by Regional Forester Cargill approving the Avon-Frisco land exchange. The Chief determined the decision did not comply with the Secretary's Land Exchange Regulations (36 C.F.R. 254) because appraisals were not complete.

Regional Forester Cargill pointed out that the Forest Service Handbook, which has been incorporated into the Regulations, specifically recommends that appraisals be completed <u>after</u> issuance of a decision in controversial cases (Section 36.3(1) of Handbook 5409.13). Cargill further pointed out that appraisals had been approved in this case, but they subsequently expired.

In essence, the Regulations contradict themselves. As a result of the remand, based upon conflicting regulations, tens of thousands of dollars and many months of effort was wasted.

Promulgation of new exchange rules and regulations under S. 1260 provides the opportunity to eliminate this and other costly and cumbersome provisions of the Regulations.

Delegation of Survey Authority

Section 3(a) of the bill amends FLPMA by adding a new subsection "e" to Section 206. At the request of BLM, this provision has been deleted from the House-passed version of this bill. However, the House recognizes the survey authorization might be desirable as a means of eliminating possible impediments to timely completion of exchanges. In it's place, the House has provided for a study of existing surveying methods to be completed within a year of passage of the bill.

Section 3(a) would give the secretary having jurisdiction over the land concerned authority to perform land surveys and issue patents to land. The primary intention of this language is to grant survey and title authority to the U.S. Forest Service where National Forest System lands are involved in exchanges. Under existing law, the Forest Service must rely on the Department of the Interior for such surveys and title issuance, and that often results in significant delays.

The Forest Service presently has survey authority over Weeks Law lands, which lie mostly in the eastern United States. The

BLM has survey authority over all public domain lands, both BLM and Forest Service. When the Forest Service requires a survey for a land disposal, a request must be made to BLM to conduct the survey. BLM currently is experiencing a three to five year backlog of survey work, and sometimes has little motivation to alter its schedule to accommodate Forest Service priorities. Elevating a survey project's priority within the BLM, regardless of its importance to the Forest Service, is often very difficult.

There is always a certain amount of inertia which must be overcome in any government agency to efficiently complete many tasks leading toward that agency's goals. Working with two agencies within two separate Federal departments is many times more difficult than if a single, motivated, competent agency did the work internally. The frustrating and confusing situation which currently exists for survey authority unnecessarily hinders completion of land exchanges in these already difficult times. However, in the spirit of cooperation with BLM, we favor deletion of this section and substitution of the House-passed study.

Adjustments for Transaction Costs

Section 3(a), in addition to the previously discussed items, also amends Section 206 of FLPMA by adding a new subsection "g". Subsection "g" permits the Secretary concerned to adjust the relative values assigned to properties in the exchange in order to compensate a party for assuming costs or responsibilities in a transaction not ordinarily borne by that party.

For example, current law requires appraisal of land for its highest economic use on the open real estate market. However, substantial costs, such as environmental studies, land surveys, mineral examinations, archaeological surveys and salvage, removal of encumbrances to title, etc., must be incurred prior to the land being made available for its open market use. In the past, Federal agencies would make a determination to allocate staff and/or funds to accommodate these costs depending on the public benefits, priority, and urgency of the exchange. When such funds or personnel were lacking, a motivated non-Federal party sometimes contributed the necessary monies or services. With the current Federal funding and staffing levels, however, many of the costs incurred to make the title to the Federal lands merchantable cannot be covered, and the government is more and more frequently asking the non-Federal party to bear this burden.

Therefore, if the non-Federal party is unable or unwilling to assume the costs, the transaction simply is not processed, regardless of its priority or public benefit. In the end, the only exchanges completed are those where the non-Federal party has the funds and motivation to complete the process. We do not believe this is the exacting criteria Congress intended for exchange priorities.

This provision of the bill will allow the Secretary concerned, if he deems it to be in the public interest, to let the exchange proponent incur these costs and have them reflected

in the adjusted property values of the Federal land. We want to make it perfectly clear this is a discretionary provision granted to the Secretary. In this manner, the parties will have the flexibility to determine by which method -- cash outlay or value adjustment -- the expenses should be paid.

Of course, the contrary situation exists also. If the non-Federal party cannot or will not pay transaction costs normally borne by that party, the Secretary may elect to pay those costs and adjust the compensation accordingly.

Two of our exchange cases illustrate the need for this adjustment provision:

1. Breckenridge, Colorado

Our client initiated a land exchange with the U.S. Forest Service in 1983. He offered 440 acres of inholdings within the Arapaho National Forest, identified by the Forest as a high priority for acquisition. In exchange, he sought 48 acres of land, within the city limits of Breckenridge, and clearly suited for disposal. An outstanding, unpatented mining claim exists on a portion of the Federal tract. In order to complete the exchange, the Federal government must institute a legal contest of the mining claim or arrange for the claimholder to relinquish the claim prior to disposal.

We are now in our fifth year of preparing for the contest of the mining claim. The regional chief of the Division of Minerals for the Forest Service anticipates a minimum of another three

85-143 O - 88 - 3

years for the contest, and the Office of the General Counsel has estimated a cost of between $150,000-200,000 for the Forest Service to process the mineral contest. We have proposed the simple solution that our client purchase the mining claim and then relinquish it at closing. Our client has agreed, provided the Forest Service agrees to adjust the value of the Federal land by the amount he must spend to eliminate the mining claim and clear the Forest Service's title to the property. We would be willing to pursue this alternative under any guidelines the Forest Service may set (for instance, a ceiling of $50,000 as a purchase price for the mining claim, or an adjustment based on the exact amount paid by our client). We have received notice from the former chief review appraiser for the Forest Service that while the concept is interesting, it is not an "approved or acceptable method" within the agency.

It <u>is</u> an approved and accepted appraisal practice within the private appraisal industry to make cost-to-cure adjustments, such as that outlined above, when appraising a piece of property. The fact that the Forest Service does not recognize this as an "approved or accepted method" illustrates the need for administrative flexibility. In the case identified above, we estimate that the provision outlined in the legislation would save the Federal government between $100,000-150,000, and two years or more of processing time.

2. Wolf Creek, Colorado

In 1987, we completed a land exchange with the U.S. Forest Service for 300 acres of Federal land at the base of the Wolf Creek Ski Area. The Federal lands were located in an unsurveyed township. A survey was necessary to enable BLM to issue a patent to the Federal lands. In a typical real estate transaction, the burden of curing an insufficient survey would rest with the property owner. However, in this case, funds were not available to the Forest Service to pay for the survey. Therefore, the private exchange proponent advanced over $25,000 to the BLM for completion of the survey. This amount was above and beyond the appraised value of the Federal lands.

Presumably, had the private party in this case not had the survey funds, or been unwilling to pay what normally would be a Forest Service expense, the exchange would have failed, and the benefits to the public lost.

Under S. 1260, an Administrative adjustment to value could be made crediting the exchange proponent with the $25,000 he advanced for a survey of Federal lands. The ability to recognize such costs would allow many non-Federal proponents to pursue public interest exchanges that otherwise could not be undertaken.

Program Funding

Section 4 of S. 1260 establishes a special land exchange fund which earmarks $4 million annually to augment existing funds and personnel available to the Secretaries of the Interior and Agriculture for land exchange programs. Due to budget and staff

reductions, many local, state and regional offices are severely hampered in their efforts to process land exchange applications, regardless of their merit. While value adjustments such as those identified in Section 3(a) will help defer many costs, a minimum agency staff and funding level is essential to maintain continuity for any land exchange program.

Wallop Amendment

We understand that Senator Wallop will offer an amendment to address the adverse affects on certain land exchanges of Federal Judge John Pratt's injunction against the Department of Interior in National Wildlife Federation v. Burford. One of our Forest Service land exchanges at Frisco, Colorado has been delayed since late 1985 by this injunction. During the 1950's, the Forest Service had withdrawn an area adjacent to the Town of Frisco from all forms of appropriation. The purpose of the withdrawal was to preserve this parcel for a possible future Forest Service administrative site. During the 1980's, the Forest Service determined that this possible administrative site was not needed, and they successfully encouraged the Town government to acquire it through exchange. In order to issue clear title to the Town, the Secretary of Interior must revoke the administrative withdrawal affecting the property. Judge Pratt's Order prohibits the Secretary from revoking withdrawals, retroactive to 1981. Senator Wallop's amendment is a balanced approach, acceptable to both the National Wildlife Federation and land exchange proponents, to resolving this difficult issue.

It is important to note that, generally, exchanges are cost saving transactions, i.e., the resource and management efficiency benefits of exchange transactions exceed their cost. Mr. Gary Cargill, at the time the Associate Deputy Chief of the Forest Service, noted an example of this at a 1986 workshop on land exchanges. He reported that in 1985, at a staff cost of $7 million, exchanges saved $8 million in right-of-way and land-line administrative costs alone.

In this regard, the modest continuity of funding that S. 1260 seeks to insure means Federal exchange programs will likely return even greater benefits to the Federal treasury in the form of administrative savings.

In its 1983 resolution supporting Utah's Project BOLD, the Western Governors' Policy Office stated:

> "Unfortunately, experience with the existing exchange procedures has been singularly unsuccessful -- value appraisals are difficult, costly, and time-consuming and the procedural complexities of the process have rendered all but the smallest and simplest exchanges virtually impossible to complete."

S. 1260 is not designed to establish new acquisition or disposal policy. It is designed to expedite a cumbersome process once the various public interest determinations of a proposal are made.

85-143 O - 88 - 4

The land exchange program has been eliminated in some areas and cut back in others, while the demand for exchanges has grown. A reconfirmation by Congress of its commitment to the land exchange process will give direction and support to Federal land management agencies. Passage of S. 1260 provides that direction and support, and also facilitates the process. We feel this legislation will benefit the Federal land exchange process and is immediately needed. We urge its prompt passage.

Senator WIRTH. Thank you very much.
Mr. Jarvis.

STATEMENT OF T. DESTRY JARVIS, VICE PRESIDENT, CONSERVATION POLICY, NATIONAL PARKS AND CONSERVATION ASSOCIATION

Mr. JARVIS. I would express our strong endorsement, both that of the National Parks and Conservation Association and the Sierra Club for enactment of this legislation which we think is long overdue and would resolve a significant problem, if one believes, as I do, that the intermingled nature of too much of the Federal land in the West needs resolution, and particularly so where areas of national significance, such as those in the National Park System, wilderness areas in the forest system and so forth are concerned, then some action must be taken, ranging from this kind of legislation to some version of a state-wide approach, as has been proposed in Utah under the name of project BOLD, and otherwise, the problems that land exchanges offer some solution for are serious and need consideration.

I would just speak to one particular point. Generally speaking, when exchanges are under consideration, the public interest test and the equal value test are viewed as separate, equal and sequential. I would think that in the case of National Park, in particular, National Park exchanges, that the problems that have cropped up and that this bill attempts to address in its arbitration provisions, regarding the difficulty in determining equal values, could be resolved with some greater leniency in the public interest test considerations and some interrelation.

In other words, the intangible values of a park and thus, of private lands within a park boundary, cannot oftentimes be determined in precise dollar terms. The SF minerals exchange in Chaco Canyon in New Mexico is the perfect example of this. There was no way that SF minerals or BLM could go inside the boundary of Chaco and dig or drill and otherwise determine how much coal was there to a precise dollar amount and yet an exchange was desired by the Park constituency, by the National Park Service, by the company involved, and some method was needed, and it took four years to work this exchange out, to get them out with some kind of a relevant equivalent exchange.

The requirement for precise equal value determination was an inhibition to consummation of a very, what was obviously in the public interest, very much in the public interest to resolve. We like to see the two tests viewed as interrelated, particularly where the intangible values of such resources as national parks are concerned. We'd also like to suggest that inter-agency specially trained teams be available to work on exchanges. There are some special skills and techniques involved that could be trained, agency personnel could be trained for and yet don't always exist, and finally, as an issue that's somewhat outside the context of the present bill, I'd like to suggest that the committee consider a requirement that the General Services Administration make excess public lands, excess Federal lands, which are turned over to them for disposal, avail-

able for a period of time to other Federal agencies as a pool of exchange lands.

Often the problem when, such as, with Hawaii Volcanoes National Park at present, in the last Congress an exchange was authorized to add a very important piece of virgin forest to that park, but only by exchange, and until some other excess Federal lands in Hawaii are made available, that exchange cannot be consummated. GSA offers, I think, the best source of lands for the conservation of many exchanges.

At that point, Mr. Chairman, I would simply point out that attached to my statement are the recommendations of a workshop that my association in the Rocky Mountain Energy Company cohosted in 1986, that involved experts from across the board in the field of land exchanges, from Assistant Secretary of Interior Horn, to others present in the room today, and those recommendations coincide essentially verbatim with the provisions of this bill and we urge its enactment. Thank you very much.

[The prepared statement of Mr. Jarvis follows:]

STATEMENT OF T. DESTRY JARVIS
VICE PRESIDENT, CONSERVATION POLICY
NATIONAL PARKS AND CONSERVATION ASSOCIATION

BEFORE THE SENATE SUBCOMMITTEE ON
PUBLIC LANDS, NATIONAL PARKS AND FORESTS
ON S. 1260 AND H.R. 1860

MARCH 14, 1988

Mr. Chairman and other distinguished members of the Subcommittee, I am T. Destry Jarvis representing the National Parks and Conservation Association and the Sierra Club. I sincerely appreciate the opportunity to appear before the Subcommittee to present our views on H.R. 1860 and 1260.

NPCA and the Sierra Club strongly endorse H. R. 1860 as a mechanism to enhance the ability of the Secretaries of Agriculture and Interior to negotiate and consummate land exchanges involving the federal estate. This type of legislation is needed to overcome the plethora of legislative and administrative roadblocks that are impeding the utility of land exchanges.

This measure speaks directly to the appraisal process which is one of the most troublesome aspects of real estate negotiations involving federal land. While not a definitive "cure-all" for appraisal problems, the measure is an attempt to remove some of the uncertainty surrounding the appraisal stage of the negotiation process. Under the language of the measure, the Secretaries of Agriculture and Interior will issue regulations that will allow the arbitration of appraisal disputes. It allows the exchange to proceed or to be called off on the basis of the final appraised value. This aspect will keep the appraisal issue from lengthening the negotiation process, a situation in the past that has led to a waste of valuable human resources, caused uncertainty in planning budgets and implementing land management plans from year to year, and placed a cloud on the use of exchanges as one of the acquisition tools available to federal land managers.

While NPCA supports the legislation as far as it goes, there are several issues surrounding the use of land exchanges the measure fails to address. If there is any criticism of the measure it is that it does not go far enough to straighten out the legal and administrative entanglements and prohibitions that are imposed on land exchanges between different federal agencies. There is no mention of the General Services Administration which controls the disposition of federal property excess to the needs of the Departments of Defense, Education, Energy, Health and Human Services, and other branches of the federal government that are not traditionally viewed as land holding departments. Oftentimes it is these departments that have the most valuable trading stock available for exchange purposes since it is often improved property near urban areas where land values are the highest. We recommend inclusion of a provision permitting the GSA to make available to Interior and Agriculture, surplus lands for use in land exchanges. Criteria and guidelines will need to be established governing this process. Then, too, the measure makes no mention of the

National Parks and Conservation Association
1015 Thirty-First Street, N.W., Washington, D.C. 20007
Telephone (202) 944-8530

availability of Outer Continental Shelf property the leasing rights for which could be used as trading stock for exchange purposes. While this land is prohibited from being used in exchanges, we must question the reason why these lands are leased out for value when that same value could be applied as compensation for private lands brought into the federal estate.

We recommend inclusion of a provision directing the two Departments to set up interagency regional exchange teams that can service all federal agencies involved in the exchanges. We face a time when many trained land acquisition officers are reaching retirement age and leaving the service of the federal government. Federal budget and personnel ceilings have slowed the hiring of competent replacements. Those experienced in the land exchange processes should be utilized by all federal agencies making the best use of resources available.

The bill also fails to allow for value determinations based on intangible factors that may still meet the national interest mandate of FLPMA. Such is the case with language found in ANILCA which allows the Secretary of the Interior to establish value on comparable worth when exact dollar determinations cannot be ascertained.

These are only a few concerns that will have to be met if land exchanges are ever going to take their place as a workable addition to the federal land manager's arsenal of acquisition tools.

In March 1986, NPCA and the Rocky Mountain Energy Company (RME) co-hosted a two-day seminar on the process of federal land exchanges, and the problems being encountered in current efforts to carry out such exchanges. The seminar, very well attended by some of the leading experts on the subject, was a great success, resulting in a number of conclusions reached by NPCA and RME which I would like to share with this Committee (attached). Among those attending the seminar were majority and minority staff from both the House Interior Committee and the Senate Energy Committee, Interior Assistant Secretary Bill Horn, each of the federal agencies significantly involved in exchanges, including the National Park Service, Fish and Wildlife Service, Forest Service, and Bureau of Land Management, the General Accounting Office, The Nature Conservancy, the Trust for Public Land, representatives from the States of Wyoming and Utah, the Western Land Exchange Company and others.

Our purpose in convening this seminar was to discuss the problems in consummating land exchanges efficiently and effectively and devising solutions to them. I believe that we were successful in both endeavors. With H.R. 1860, we have the first positive opportunity to actually achieve results toward improving the usefulness of the land exchange tool in accomplishing the respective missions of the several federal agencies managing the public lands.

NPCA strongly supports the enactment of H.R. 1860, a sensible mechanism to facilitate better land exchange practices involving the federal estate. We appreciate the opportunity to testify today and would be happy to answer any questions.

EXCHANGE WORKSHOP RECOMMENDATIONS

1. Land Exchanges Only One Tool

Land exchanges should be viewed as only one land management tool within a portfolio of such tools. Land exchanges should not be viewed as a substitute for direct land purchase using appropriations from the Land and Water Conservation Fund.

2. Senior Management Attention Required

Land exchanges are complex and work best when senior management officials focus attention and leadership on exchange activities. Many exchange "problems" are actually just the result of poor management or inattention to management. Such attention is needed to keep the complex exchange process moving forward in a timely manner and to keep it from being retarded by administrative obstacles that cannot be surmounted by field personnel.

3. Exchange Costs

While land exchanges may be viewed as a "trading up" of federal estate and less costly than direct purchases, they are not cost free. There are costs associated with appraisals, equalization payments, staffing, title insurance, and other requirements associated with the transfer of title to real estate. Consideration should be given to establishing an independent exchange account within the structure of the Land and Water Conservation Fund. At the same time, consideration should be given to creating a true "trust fund" based on the LWCF model for the purposes of purchasing nationally significant lands.

In the same light, consideration should be given to an equitable division of exchange costs between proponents. Costs associated with real estate transactions and costs associated with other considerations, such as archeological surveys and clearing title, must be figured into the overall exchange process. Consideration should be given to negotiating the division of costs between proponents on the basis of benefits prior to entering the actual exchange process.

4. Resource Teams May Help

The complexity of land exchanges requires land acquisition personnel to develop expertise in a broader array of skills than does fee purchase. There is a growing concern that sufficient numbers of qualified land acquisition personnel will cease to be available in the not too distant future. Further, there is concern that as a country we must learn to do more with less. Therefore, consideration should be given to developing "teams" of experienced personnel which can serve more than one district, or forest, or refuge, or park. Such "resource teams" might be a method to allow experienced, highly skilled human resources to be more productive.

5. Oversight Needs Streamlining

There is currently considerable Congressional oversight of selected land acquisition practices and projects. Some of this oversight proves burdensome to the timeliness of negotiated land transactions. Congressional committee approval of projects involving "declarations of taking" and payments above appraised value are cases in point. Consideration should be given to streamlining this oversight. It is therefore recommended that Congress limit such oversight to an annual oversight process whereby the overall performance of agencies in the realm of exchanges can be weigned against Congressionally set public policy goals on a yearly basis. Despite this recommendation, it will still be necessary for Congress to approve specific exchanges, such as interstate lands.

6. Appraisal Process Needs Improvement

Appraisals have proven through time to be the most critical element of the land acquisition process, regardless of the acquisition technique employed in a particular project. This is especially true in land exchanges which require that lands exchanged be of "equal value." Several issues evolve from a discussion of appraisals in the context of land exchanges and all are components of establishing "value."

First, while the requirement that lands exchanged be of "approximate equal value" is a cornerstone of the land exchange idea and a goal that should not be abandoned, there are times when exact values cannot be determined. This may be due to an inability to assess in situ mineral resource potential, to the lack of comparative market values, or to such intangible factors such as "national significance." Consideration should be given to a broadening of the concept of "value" to include cases where the public interest outweighs exact dollar measurements. In such cases where the public interest justifies this approach, consideration should be given to the use of "comparable value" or "equivalent value" in the exchange process. While care should be used in the application of this approach, its use can assure exchanges in the national interest that would prove impossible under the current standardized, rigid approach.

Second, many of the problems associated with the establishment of value can be addressed at the inception of exchange negotiations. Proponents can address the selection of appraiser, their differing views of "value", the apportionment of appraisal costs, and the procedures to be used if assigned value is not acceptable before human resources are expended on an exchange project. Special emphasis could be placed on the use of arbitration, including "binding" arbitration, the establishment of a value acceptable to all proponents. Such agreements can facilitate expeditious exchanges and the best use of valuable human resources.

Third, several federal agencies are required to acquire only the minimum interest needed to meet their individual mandates. This practice carries hidden costs, such as enforcement of restricted use, disputes arising from split estates (mineral/surface), and the cost of acquiring the remaining interest in the future if needed. This practice adds to the uncertainty of establishing value in the appraisal process. Consideration should be given to acquiring only fee title in cases where land exchanges are utilized.

Fourth, in situ mineral resources place special burdens on the appraisal process. In some situations, it is impossible to establish the exact value of the mineral estate due to the geologic structure of the mineral in question. In other situations, as is the case of minerals found within the boundaries of national parks, valuation techniques may be too damaging to be employed in the appraisal process. In other cases, proponents can agree to remove the "hindsight" variable in the appraisal process, i.e., proponents can agree to arrangements such as the sharing of any future royalties from mineral extraction to overcome an inability to project the actual market value of the in situ minerals. Such arrangements employed at the beginning of negotiations can prevent protracted argument over valuation.

7. Consistency Is Needed

Many exchange issues are currently dealt with differently within different agencies as well as within different offices of the same agency. In general, the public trust will be enhanced and exchanges will move more expeditiously if the procedures become as uniform as possible. However, there is no need to, in fact, there are strong reasons against the development of detailed "cook book" procedures and/or definitions for exchanges. Particularly, there appears to be no reason for defining "in the public interest" beyond the current statutory definition.

8. Public Involvement Necessary

Since exchanges utilizing federal lands affect a variety of interests, both public and private, public involvement should be encouraged at an appropriate stage in the exchange process. Consideration should be given to the idea of loosely packaging an exchange proposal prior to public participation. Public concerns can then be addressed and built into the exchange at a time before proponent expectations become irreversible and non-negotiable.

9. Land Inventory Needed

In order for a federal land exchange to be contemplated, there must be public land which has been determined, by professional staff through the agency's land planning and classification process and with public involvement, to be excess to its needs and suitable for exchange. At present, excess lands are ordinarily lost to this purpose as a consequence of the laws and regulations of the GSA.

Assuming for purposes of this recommendation that GSA laws/regulations governing disposal of excess/surplus lands can be altered appropriately, we recommend that the following process principles for the inventory and identification of suitable lands for exchange be adopted or continued:

The potential for identifying federal lands suitable for exchange varies significantly with each of the four federal land managing agencies in a progression from least to most land for exchange as follows:

1. National Park Service

Because, with few exceptions, Congress has drawn and/or specifically approved the precise boundary for each unit of the national park system, the NPS has only very little occasion to consider administrative land exchanges. In fact, since at least 1973 (though it was firm policy long before this) the NPS has been statutorially prohibited from "alienating existing park lands in order to acquire by exchange." However, several individual park statutes allow exception to this law including, most notably, the Alaska National Interest Lands Conservation Act of 1980, which not only authorizes exchange of park land to enhance park management, but allows the Secretary to carry out exchanges for "other than equal value" if he finds it to be "in public interest." Despite the appropriate restrictions on exchange authority, the NPS has considered in its general management planning process the possibility that some lands may be suitable for exchange. In every case where an exchange is deemed appropriate by agency professionals, congressional ratification should be sought. The recent boundary legislation for Acadia National Park illustrates this approach.

2. U. S. Fish and Wildlife Service

Unlike the NPS, not all FWS land acquisition is specifically authorized by boundary determinations of Congress. In many cases, FWS is given general acquisition authority to purchase specific types of wildlife habitat, i.e., potholes or wetlands without firm boundaries. Consequently, FWS has somewhat more flexibility to inventory and identify possible lands for exchange. Nevertheless, the wildlife refuges are a statutorially recognized system of lands which Congress has clearly intended be maintained in perpetuity. Thus, administrative exchange authority is limited, and any major exchange would have to be ratified by Congress.

3. U.S. Forest Service

Of all the four land managing agencies, the FS currently has the most comprehensive, systematized land exchange program. Unlike NPS and FWS units where Congressional intent has been that virtually all lands in most units are to be acquired, national forest boundaries, particularly in the East, have encompassed large areas of private lands, often in a checkerboard pattern. In western forests, state-owned school lands are found in most units.
FS has a better process than other agencies, incorporated both in its annual budget and its individual forest plans for identifying suitable land and conducting land exchanges on a routine basis.

Nevertheless, FS could improve the identification of suitable exchange lands and elevate this activity somewhat in its priorities. If any aspect of the proposed BLM/FS interchange is implemented, a special inventory program should be undertaken in those new area administered by FS to identify any lands suitable for exchange.

4. Bureau of Land Management

BLM public lands offer the most significant opportunity for enhanced land management through the exchange procedure. However, not all, or even most, BLM public lands are suitable exchange lands, and BLM professional staff is appropriately resentful of repeated unplanned and unexpected "raids" on lands it administers by other agencies for exchange lands.

The resultant impass can be, perhaps only be, resolved after a thoroughly professional inventory of BLM public lands which has as its focus the identification of specific lands, features, resources appropriate for retention in perpetuity. Out of this process would inevitably come lands identified as suitable for exchange.

Public lands administered by BLM include many areas of special significance, unique geologic features, critical wildlife habitat, spectacular scenery, and accessible recreation opportunities, all of which should be inventoried, managed and protected through specific designations unique to the BLM. Obviously, many BLM lands also contain resources suitable for development, extraction, or use, and most of these lands would undoubtedly be found by a professional inventory to be recommended for retention as well.

As a result of the inventory, when lands for exchange have been identified, BLM should be given the policy and leadership support to aggressively pursue exchanges, both to consolidate its own special management areas and to make lands available to other federal land managing agencies for carrying out land exchanges.

In this manner, BLM lands offer the major opportunity for improving management and protection for a wide variety of federal lands through carefully crafted, professionally guided land exchanges.

NATIONAL PARKS AND CONSERVATION ASSOCIATION

ROCKY MOUNTAIN ENERGY COMPANY

MAY 1986

Senator WIRTH. Thank you very much.
Mr. Rey.

STATEMENT OF MARK REY, VICE PRESIDENT, PUBLIC TIMBER COUNCIL, NATIONAL FOREST PRODUCTS ASSOCIATION

Mr. REY. Thank you. I appreciate the opportunity to testify on S. 1260, the Federal Land Exchange Facilitation Act of 1987. I will endeavor to be mercifully brief, as I summarize my statement.

The National Forest Service Products Association supports the legislation, such as S. 1260 and H.R. 1860, as passed by the House, both of which are designed to improve and expedite land exchanges. Our members are regularly involved in various exchanges with both the Forest Service and the Bureau of Land Management and thus we are aware of the difficulties associated with even relatively minor land exchanges.

This bill is similar in intent to H.R. 4814, which was introduced in the last section of Congress. However, it is improved in several aspects. These changes make this proposed legislation supportable from the wood products industry standpoint, and we are particularly pleased with the emphasis on mutual agreement between parties on all of the significant aspects of the bill, including those that you discussed with the witnesses this afternoon.

There's one element of the proposed legislation that we'd like to discuss in particular. The bill calls for separate regulations from the Department of Agriculture and the Department of Interior to implement the law. While we recognize that this is procedurally necessary, we would like to see language in the bill, or the accompanying Senate Report, that will call upon the relevant Secretaries to promulgate identical regulations where applicable to assure uniformity of application and avoid potential inequities.

In summary, the Forest Products industry supports efforts to include the land exchange process with the Federal Government. We believe that S. 1260 generally meets this objective. We are willing to work with the committee and the departments to develop acceptable procedures to implement this important legislation. Thank you for the opportunity to offer our views.

[The prepared statement of Mr. Rey follows:]

STATEMENT FOR THE RECORD

OF

MARK REY
VICE PRESIDENT
PUBLIC TIMBER COUNCIL

OF

NATIONAL FOREST PRODUCTS ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON PUBLIC LANDS
COMMITTEE ON ENERGY AND NATURAL RESOURCES

OF THE

UNITED STATES SENATE

MARCH 14, 1988

Good morning. Mr. Chairman, I am Mark Rey of the National Forest Products Association. NFPA is a national trade association representing companies that own forest lands and manufacture wood products throughout the United states.

We appreciate the opportunity to testify on S. 1260 -- The Federal Land Exchange Facilitation Act of 1987. We support legislation such as S. 1260 and H.R. 1860 as passed by the House which are designed to improve and expedite land exchanges. Our members are regularly involved in various exchanges with both the Forest Service and the Bureau of Land Management. Thus, we are aware of the difficulties associated with even minor land transfers.

This bill is similar to H.R. 4814 which was introduced during the last session of Congress. However, it is improved in several aspects. These changes make this proposed legislation generally supportable from the wood products industry's standpoint. We are particularly pleased with the emphasis on mutual agreement between parties on all of the significant aspects of the bill.

There is one element of the proposed legislation that we would like to address in particular. The bill calls for separate regulations from the Departments of Agriculture and Interior to implement the law. While we recognize that this is procedurally necessary, we would like to see language in the bill or the accompanying Senate report that would call upon the Secretaries to promulgate identical regulations where applicable to assure uniformity of application and to avoid potential inequities.

In summary, the wood products industry supports efforts to improve the land exchange process with the Federal government. We believe that S. 1260 generally meets that objective. We are willing to work with the Committee and the Departments to develop acceptable procedures to implement this important legislation. Thank you for the opportunity to testify.

Senator WIRTH. Thank you very much and I appreciate the comment that you make about getting parallel sets of regulations and what we will do is to focus that, we've just been talking about that here, focus that in report language and do what we can to urge and require the Secretaries as to have parallel language. I think that's a good suggestion.

It seems to me, Mr. Jarvis, on your suggestion of using GSA lands, putting them in a pool for potential exchange, for agencies, wasn't that done once sometime ago? Didn't we do that under the Nixon Administration?

Mr. JARVIS. Well, they had a program in which the lands were essentially transferred. Parks to the People is what it was called, and the first choice, basically, when a Federal Agency declared lands excess or surplus, local governments were given the opportunity to select them for park purposes. That program has long since come to an end, and certainly for the last seven years or perhaps longer the pre-election of the GSA is to sell for the highest dollar any excess lands.

There's nothing wrong with that at the end of the process, but there needs to be a step in between, in my view, that would make those lands available for a period of time, for these kinds of public purposes, short of a sale for cash.

Senator WIRTH. I would be interested in seeing then what language you have on that issue.

Mr. JARVIS. I'll do that.

Senator MELCHER. Both of the agencies apparently testified a few moments ago, that is, BLM and the Forest Service that the time frame was long because of environmental impact statements and requirements of the Endangered Species Act.

None of these bills change any of that. Are they, in your judgment, the three of you, are they wrong on that, Mr. Glass?

Mr. GLASS. Senator Melcher, there certainly are cases where there are endangered species that take a lot of study in order to complete an exchange. The vast majority of the exchanges can be done with an EA rather than an EIS and can be expedited relatively quickly of the time it takes to arrive at fair market value or appraised values could be arrived at quickly.

Senator MELCHER. Well, first of all, the question of an EIS, or an EA, are you saying using an EIS, that they're using an EIS when they should be using an environmental assessment?

Mr. JARVIS. They seldom go the full complaints route. They seldom do a full EIS and I think to argue that the the National Environmental Policy Act is in some way a encumbrance on the consummation of exchanges, is incorrect.

Senator MELCHER. You don't think they should use an environmental impact statement?

Mr. JARVIS. I think in most cases it's unnecessary, because the nature of the result of an exchange is not a significant Federal action, under the terms of NEPA and the CEQ guidelines. An environmental assessment is nearly always. If there was a case involving endangered species, a case involving some major dislocation or removal from Federal ownership of lands of paramount national significance, for example, or controversiality, and thus meeting one

of the major tests of NEPA, then a full EIS would be necessary, but that's rarely the case.

I think more often, as in the example I used with Sante Fe Minerals in New Mexico, that company offered to set the value of the lands in the park at the value of the archeological salvage that would be necessary if they were to mine there and that threw BLM into chaos, because they had never been confronted with that kind of a valuation proposal and it just—that by itself delayed the process for a year. Even though it was a very kind, generous offer on the part of the company, it just delayed the process for a year, for them to consider whether that was an appropriate way to go or not.

It had nothing to do with NEPA or endangered species or anything else.

Senator MELCHER. Well, to determine—Well, let's just take them one at a time then. The environmental impact statement—NEPA's pretty broad. It says, any significant Federal action. Do you have case law?

Mr. JARVIS. The process they would normally pursue is to make a determination of first whether there is a significant Federal action, or a significant action having affect on the human environment. They could issue a Fonzie, a finding of no significant impact. That's a very short process.

Senator MELCHER. Six months for an EA, correct?

Mr. JARVIS. Correct.

Senator MELCHER. You agree with this, Mr. Rey?

Mr. REY. I guess I would have answered your question a little bit differently, but I don't materially disagree with the line you've taken so far. Why don't you——

Senator MELCHER. How would you answer it differently?

Mr. REY. My answer would be that I don't have any reason to dispute what the two agency representatives said, that on occasion the compliance with either the National Environmental Policy Act, or some other environmental statute contributes to the time it takes to consummate an exchange, but nobody has ever held S. 1260 forward as a piece of legislation that would remove all the delays associated with exchanges. I think rather what the authors of S. 1260 attempted to do was try and find those elements of delay which they hoped were noncontroversial and went to the mechanical aspects of completing the exchange process in fashion ways to shorten those time periods.

And so, I guess my answer would be yes, compliance with NEPA and the Endangered Species Act is in cases a source of delay. No, this bill doesn't reach those sources of delay, but it does shorten the process elsewhere in the fashion that has probably fairly uniquely brought the National Parks and Conservation Association and the National Forest Products together to support the same piece of legislation.

Mr. MELCHER. All right, let's just assume that an EA is about all that's required in almost all instances. Let's just assume that now in the Endangered Species Act, isn't that—that has to be rather rigorous, as I understand it.

Mr. JARVIS. If the lands involved, proposed for divestiture from the Federal Government were found to contain endangered species habitat——

Senator MELCHER. Just to find out if there are any endangered species, it's rather rigorous, is it not?

Mr. JARVIS. Particularly, if you're talking about a large block of land. I mean, to do a survey of a piece of property, you know, of a few thousand acres, should not be very difficult or time consuming. If you're talking millions of acres, as project BOLD might propose in Utah, then it's a much more formidable task. But, in the normal course of Forest Service, Park Service, BLM exchanges, it should not be that difficult.

Senator MELCHER. What is normal in the Forest Service? What are we talking about, ten sections? Six, seven thousand acres, is that normal?

Mr. GLASS. From my company's experience, that would be a very substantial exchange, and we're more likely to find 40 acres of urban land in the middle of the town of Vail or something being exchanged for 4,000 acres of wilderness in holdings or something like that. And what happens with the Endangered Species Act is that the EA looks at the question of endangered species and if there is a determination that there are no endangered species, well, that's the end of it. It's only if there are, either through literature or through some direct field investigation that an endangered species is found that you might have to go to that next level.

Senator MELCHER. Well, then the minerals—I think Mr. Burford answered it correctly. If the minerals are unknown in the Federal land, they would be retained. Does that meet with your—Does that seem to you good public policy?

Mr. JARVIS. Except in the case of National Parks, where you are exchanging mineral rights out and the company or the individual involved is seeking mineral for mineral, as was the case with the Chaco exchange. There was suspected coal within the boundaries of Chaco and the company wanted known coal adjacent to lands it already owned and was mining and those had been assessed. There was a fairly certain understanding of how much coal was in the lands they were to acquire from the Federal government, but much less certainty over the lands in the park, as to how much coal might underlay the park.

Senator MELCHER. Well, in the park the mineral is not going to be mined.

Mr. JARVIS. Correct.

Senator MELCHER. So, you're saying that private exchange in that case, the private—was private within the park?

Mr. JARVIS. Yes.

Senator MELCHER. And they knew what was there?

Mr. JARVIS. They felt there was coal, but they had never dug. The owners felt there was coal there, by virtue of some sufficial geology testing, but no actual mining.

Senator MELCHER. Was this BLM or the Forest Service?

Mr. JARVIS. It was BLM.

Senator MELCHER. And BLM then trades them some land with minerals, and gives them the minerals?

Mr. JARVIS. Yes. And, there was a case where, from our perspective, there was a public interest question that it was clearly of paramount public interest to exchange them out of the park, to preserve those archeological resources in a pristine condition.

Senator MELCHER. I can understand that. But, this bill doesn't identify or any of these bills including the ones submitted by draft language, submitted by Mr. Burford, I guess on the behalf of the Administration.

Would exchange land that is not in the National Park, just for purposes, because somebody wants to exchange it, doesn't that mean that the minerals should be retained, if the Federal Agency doesn't know how much value they've got?

Mr. JARVIS. I think if we're talking non-National Park System lands, that in most cases that would be the most appropriate course of action, for parties to retain their interest or perhaps——

Senator MELCHER. I think perhaps you and Mr. Glass, or at least Mr. Glass, as I understand it, you are talking about principally, about land, that a city needs or a community needs, and those are special cases. This legislation is pretty broad. It isn't special cases. I'm talking about National Parks. Those are really special cases. But this is for anything and everything.

Mr. GLASS. Senator, there is really two roles, if you get down to the lowest common denominator that drive decisions about land exchanges. One is fair market value for fair market value and this bill really tries to address the biggest problem with exchanges, regardless of where they occur, which is establishing value.

The second test is known as the public interest test and in essence, what that test and FLPMA requires, is that the public values of the lands, which the Federal Government is receiving, have to exceed the public values of the Federal lands that are given up and that's in essence what the EA or EIS attempts to establish. And so, it's with those relatively broad directives that the agencies make their "public interest determination. '

Senator MELCHER. Mr. Rey, your people aren't looking for minerals?

Mr. REY. No, and I have little expertise in the mechanics of mineral exchanges.

Senator MELCHER. Would you say in general that the minerals ought to be retained or what?

Mr. REY. Yes, I think Director Burford answered that question, as you indicated, properly this morning.

Senator MELCHER. Mr. Rey, how about access? You're familiar with those problems, are you not?

Mr. REY. We are and there is much a problem for many private owners trying to access across Federal lands, as the reverse is the case and I think our experience has been roughly similar to both the Federal agencies, in that we've occasionally used exchanges to try to solve access problems, but that's only in the fortunate circumstance where that opportunity exists.

Senator MELCHER. Thank you.

Senator WIRTH. Gentlemen, unless you have any words that you think are necessary for the good of the order, we would thank you all very much for your time today and for your testimony and for your help. As you know, we are looking to mark up the legislation

in the committee a week from Wednesday and we will do the best we can in the language that you are suggesting and if you have any specific ideas, as to what that language ought to look like, we would certainly welcome your input on that, in terms of making the Forest Service and the Department of Agriculture and Department of Interior language parallel.

If you would give some language on that front, we'd appreciate getting suggestions from you. Mr. Rey, I look forward to working with you on that, the other language that you had suggested, related to the GSA, which I think would be very good. And so, you'll get back to us, right, Mr. Jarvis?

Mr. JARVIS. Yes.

Senator WIRTH. Mr. Glass, thank you very much for coming in. We're delighted to have you here and with that, the hearing will adjourned.

[Whereupon, at 3:30 p.m., the hearing was adjourned.]

[The subcommittee received the following statement for the record:]

STATEMENT OF THE

AMERICAN CONGRESS ON SURVEYING AND MAPPING/

AMERICAN SOCIETY FOR PHOTOGRAMMETRY AND REMOTE SENSING

FOR THE HEARING RECORD ON

"THE FEDERAL LAND EXCHANGE FACILITATION ACT OF 1987"

BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS, NATIONAL PARKS AND FORESTS

SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

March 14, 1988

On behalf of the American Congress on Surveying and Mapping (ACSM) and the American Society for Photogrammetry and Remote Sensing (ASPRS), we appreciate the opportunity to comment on the Federal Land Exchange Facilitation Act of 1987, H.R. 1860.

ACSM represents professionals involved in communicating the earth's spatial data through surveying and mapping science. The society's 12,000 members include those working in the private and public sector on land and geographic information systems, computer-assisted and traditional cartography, and geodetic and land surveying. ASPRS represents 8,000 professionals in the private and public sector who are actively engaged in the practice of photogrammetry, photointerpretation and remote sensing. These two national professional and technical societies operate a joint government affairs program.

The purpose of the proposed "Federal Land Exchange Facilitation Act" is to streamline and expedite federal land exchanges between federal and non-federal landowners involving lands managed by the Departments of the Interior and Agriculture. To promote the orderly exchange of lands, all parties involved must have

accurate land data, including surveys and maps. Land data is used for endless purposes such as land management and planning; resource management, public works, forestation; land conservation; utility information, among others by Federal, state and local governments.

The basic legislation, administrative rules and customary practices guiding the form of current land records in the United States has remained unchanged since the time of the American Revolution. Although the current method of collecting and storing land information is based on existing laws which were developed and assigned for specific purposes, several technological and socioeconomic trends are compelling all levels of government to focus on modernizing land information records to link new data to existing data.

In a 1980 report, the National Research Council of the National Academy of Sciences found "there is a critical need for a better land-information system in the United States to improve land-conveyance procedures, furnish a basis for equitable taxation, and provide much needed information for resource management and environmental planning."

Modern technology is rapidly advancing in the field of land information systems where it is anticipated that by the year 2000 more than $90 billion may be invested by government and industry

to build land information data bases. It is important that the federal government play a leadership role in developing federal land information system standards which will eliminate duplication of information and provide for compatibility among the government data bases.

To this purpose, the House of Representatives approved H.R. 1860 in December 1987 containing Section 8 which provides for a one year Land Information Study. The study will review the existing methods of land surveying and mapping in the federal government and the methods of collecting, storing, retrieving and disseminating information about federal or other lands. Additionally, it provides that the Secretary of Interior consult with other federal agencies; state and local governments; the National Science Foundation and representatives of private sector surveying and mapping science during the one year study. Through this study, it is anticipated that the federal government will develop model land information systems standards for compatible multipurpose land information systems.

ACSM-ASPRS strongly support and encourage the inclusion of Section 8, the Land Information Study in the Federal Land Exchange Legislation which is ultimately reported by the Senate Energy and Natural Resources Committee.

Not only would this provision prove valuable to the federal government in expediting its land exchanges, but it will be of utmost importance for public and private agencies and organizations to have federal guidelines so repeated collection of the same land information due to incompatibility does not occur. In 1980, the National Research Council study on the "Need for a Multipurpose Cadastre" noted:

> "federal agencies should conduct technical studies, recommend standards, offer financial support through cooperative programs and grants, and ensure that work performed by federal agencies is compatible with the multipurpose cadastre."

Another important aspect of the proposed one year study is the inclusion of representatives of private sector surveying and mapping science. Both ACSM and ASPRS have played a major role in the development, promotion and coordination of land information systems activities since 1980. As professional societies, we have participated in a network of federal agency program coordinating committees and private sector committees dealing with land information systems. For this reason, we believe that ACSM and ASPRS should be consulted during the proposed one year study as representatives of private sector surveying and mapping science in Section 8 (b)(5) of H.R. 1860. Both societies have expertise in geographic information systems and land information systems which would be helpful to the Secretary of Interior in developing recommendations to be incorporated in the study.

We believe that the proposed study in Section 8 would not duplicate previous studies which have been undertaken on the subject of land information systems, instead it would build upon the previous efforts and outline specific methods for improving the Federal structure. This study is necessary and important to all organizations interested in land information data. Unless there is a uniform approach to information collection, storage and access led by the Federal government, taxpayers money will be wasted through duplication of effort and overall government inefficiency.

We wish to comment on the broader impact of H.R. 1860 as it pertains to licensure of land surveyors performing work for the Bureau of Land Management and the Forest Service on federal land exchanges. With respect to the survey authority, we raise the question of registration and licensure. In recent years, the Forest Service has encouraged its survey personnel to become licensed in the states in which they practice. We commend the Forest Service for this effort and would not discourage its continuation. We would recommend that this proposed legislation be amended to require Forest Service survey personnel to be licensed.

Licensing puts the Forest Service and the Bureau of Land Management on the same level as private surveyors and provides consistency in the manner in which survey work is conducted.

This is particularly true in the area of resurveys and retracements which account for most Forest Service cadastral work.

Currently, states provide an exemption for federal employees in their surveying registration laws. This is a result of several court cases in which the Supreme Court ruled that a state licensing requirement of an agent of the Federal government would subordinate the activities of the Federal government to state control. However, the Committee should keep in mind the fact that when we speak of "federal land surveys" we are also speaking of private property lines. Except in the rare instance in which a National Forest is bordered by some other Federal property, every mile of national forest boundary is at the same time a mile of private property line.

States require licensing of private surveyors in order to protect the public interest and to assure the consumer that the surveyor has met certain requirements. We believe it is also in the public interest for those surveying lines which serve as both a private and federal boundary line to be registered in that particular state.

Not only should the Bureau of Land Management and the Forest Service honor state law regarding licensure and registration, but we also believe it would be prudent for the agency to comply with

state statutes governing corner recordation, filing and certification, and platting when the survey affects the bona fide rights of a private owner or is adjacent to private lands. Compliance with state procedures will promote harmony and cooperation among private surveyors, private property owners and the Bureau of Land Management and the Forest Service. It will also provide consistency in the procedures of the Bureau of Land Management, the Forest Service and private surveying professionals in each state.

Finally, we are concerned that surveys of the federal government are being performed by contractors under the competitive or "low bid" system. That is, in effect, what the Forest Service does when it contracts for professional surveying services. The basis for present statutory authority for procurement of personal and professional services, such as surveying and mapping, can be traced back to an 1861 Appropriations Act. This Act provided for the appropriation of funds for various purposes, including the compensation of civilian surveyors. Section 10 directed that all contracts for supplies or services be made by advertising for proposals "except for personal services." A year later, the Attorney General ruled that a contract for surveying was a contract for personal services within the meaning of the Act and, therefore, could be made without advertisement and competititive bidding. In reaching his decision, the Attorney General

observed:

> "...although this policy (price competition) is certainly desirable in all cases, there are yet some to which it cannot well be applied. Such are contracts for services which require special skill and experience...In all contracts for services which presuppose trained skill and experience, the public officer who employes the service must be allowed to exercise a judicious discrimination, and to select such as, in his judgement, possesses the required qualifications. Of this class of contracts are surveying the public lands. The service to be performed requires not only fidelity and integrity, but a certain kind of skill and knowledge, and the officer whose duty it is to let the contract, is bound to know that the person he employs possesses these qualifications. It is not half so important to have the work done cheaply as to have it done well, and the price to be paid for it, whilst it should be but fair and reasonasble, ought to be far from controlling consideration."

The answer is to contract for surveying and mapping services in the same manner as architecture and engineering services. Public Law 92-582, commonly known as the Brooks Act, provides for contract awards to professionals based on their demonstrated competence and qualifications and negotiation of a fee that is fair and reasonable to the government. It was the process used by these agencies until an adverse GAO opinion in 1977, and is used today by such agencies as the Corps of Engineers for their surveying and mapping, the Federal-Aid Highway Program, the Federal Aviation Program, the Superfund Program under EPA, and others.

In summary, ACSM-ASPRS strongly support the inclusion of Section 8 Land Information Study in H.R. 1860 and believe the federal government has an obligation to play a major role in this area.

We believe that ACSM-ASPRS, professional societies representing private sector surveying and mapping science, should be consulted during the one year study. Both societies have noted expertise in the area of land information systems. We encourage licensing of federal surveyors to provide consistency in the manner in which survey work is conducted and believe it would be prudent for the Bureau of Land Management and the Forest Service to comply with state statutes governing surveyors when the survey is adjacent to private land or would affect the bona fide rights of a private owner. Lastly, we recommend that the Bureau of Land Management and the Forest Service use Public Law 92-583, the Brooks Act qualifications based procedures when contracting for surveying and mapping services rather than the "competitive bid" process.

○